

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
HON. OLIVER W. WANGER, JUDGE

NATURAL RESOURCES DEFENSE )  
COUNCIL, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
DIRK KEMPTHORNE, Secretary, )  
U.S. Department of the Interior, )  
et al. )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. 05-CV-1207-OWW  
HEARING RE INTERIM REMEDIES  
DAY 4

Fresno, California

Friday, August 24, 2007

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 4, Pages 714 through 830, inclusive

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1 Friday, August 24, 2007

Fresno, California

2 8:13 a.m.

3 THE COURT: Good morning, ladies and gentlemen. Back  
4 on the record in NRDC versus Kempthorne. We're going to  
5 resume the testimony of Ms. Goude. Mr. Wall, you may proceed.

6 MR. WALL: Thank you, Your Honor.

7 CAY COLLETTE GOUDE,

8 called as a witness on behalf of the Federal Defendants,  
9 having been previously sworn, testified as follows:

10 CONTINUED CROSS-EXAMINATION

11 BY MR. WALL:

12 Q. Good morning, Ms. Goude.

13 A. Good morning.

14 Q. Ms. Goude, in developing the Fish & Wildlife Service's  
15 Action Matrix, did you have in mind any amount of water that  
16 would be available for environmental actions during the coming  
17 year?

18 A. I didn't, no.

19 Q. Was there discussion among the people who developed the  
20 Action Matrix of the amount of water that would be available  
21 for the coming year?

22 A. I was on vacation the first few days it was developed.  
23 When I came back and found there was a discussion of the water  
24 costs, I went back in to the biologists and said they were not  
25 to discuss that. That was not what their charge was ask that

1 was not what I was interested in.

2 Q. Ms. Goude, I thought that your testimony had included  
3 reference to water costs.

4 A. Not my testimony. I was referring to the declarations  
5 that I had read from everyone, it seems, Ron Milligan, John  
6 Leahigh. There was an issue as it relates to the concern for  
7 upstream storage for fall -- I mean, for winter run salmon,  
8 fall run on the American, steel head on the American, as well  
9 as the concern that you have carryover storage, which is a  
10 water -- it's not a cost, it's a concern that you have to pay  
11 attention to the hydrology of the system. Because I was  
12 saying, if I have it correctly, that the 2007 is a concern for  
13 2008.

14 Q. So Ms. Goude, the relative amount of water that different  
15 actions would take played no role in your decision making?

16 A. I really didn't pay attention to it because truthfully  
17 there was -- the numbers were all over the book and it was  
18 really depending on whether it was a wet year coming in, a dry  
19 year. And I had enough information to review and deal with  
20 other than worrying about water costs, which is not my  
21 expertise nor did I really care.

22 Q. Ms. Goude, let me direct your attention to the action  
23 matrix, which is attachment to your declaration of July 9th,  
24 2007. And I would, in particular, ask you to direct your  
25 attention to action one. Am I correct that the action there

1 provides for flows to be no less negative than 2,000 cfs for a  
2 ten-day period?

3 A. Correct.

4 Q. And there was some discussion within the group of people  
5 developing this proposal about whether to have flows that were  
6 not negative develop; right? There was discussion of flows  
7 between zero and 2000 cfs; is that right?

8 A. That's my understanding. At that point I was not there.

9 Q. Well, Ms. Goude, yesterday you provided some testimony for  
10 us about how that decision was made. Are you familiar with  
11 how that decision was made?

12 A. Yes. They said that there was discussion between zero or  
13 2,000 and that it appeared there was little benefit between  
14 the two from the Particle Tracking Model.

15 Q. Right. And the Particle Tracking Model is the model where  
16 particles are ejected into a computer simulation to see where  
17 they go; correct?

18 A. Correct.

19 Q. Ms. Goude, action one on the Fish & Wildlife Service's  
20 matrix is designed to protect the adult lifestage of delta  
21 smelt; is that correct?

22 A. That's correct.

23 Q. And Ms. Goude, adult delta smelt do not swim -- do not  
24 behave as particles; do they?

25 A. Not generally, no.

1 Q. They swim; correct?

2 A. Although not well, yes.

3 Q. And at this time of the year, they are engaged in a  
4 volitional upstream migration; correct?

5 A. Correct.

6 Q. Which would be against the flow of water, the water  
7 flowing downstream; correct?

8 A. Correct.

9 Q. Ms. Goude, the particle tracking method -- or model is not  
10 a reliable method of determining where adult delta smelt will  
11 swim; correct?

12 A. Not -- it should be used with other tools and information.

13 Q. Ms. Goude, do you have, in front of you, the proposals put  
14 forward by Dr. Swanson and attached to her August  
15 3rd -- excuse me, August 13th declaration?

16 A. Yes.

17 Q. Could you tell me what the proposed flows she recommends  
18 at that time of the year are in her action?

19 A. An increase in the San Joaquin -- I mean, the Sacramento  
20 River flows at three parts of 25,000 cfs over three days or  
21 increase in San Joaquin River outflow by ten percent over  
22 three days. And -- well, those are the flows.

23 THE COURT: Did you mean to say 25,000?

24 THE WITNESS: Yes. And the flows that she's  
25 recommending is between -- well, no, I guess that's the ones

1 during that period of time.

2 BY MR. WALL:

3 Q. Ms. Goude, could you look at the column heading above what  
4 you just read?

5 A. Triggers.

6 Q. Are those the flows that Ms. -- Dr. Swanson --

7 A. Oh, I'm sorry, the action is a minus 2750 and a 4250 for a  
8 five-day average.

9 Q. Do you know what flows she's recommending for the first  
10 ten days of this action?

11 A. Zero.

12 Q. And that would be roughly during the same time period as  
13 your proposal of 2,000 cfs upstream?

14 A. Roughly.

15 Q. And Ms. Goude, your basis for choosing between these two  
16 is the particle tracking method; correct?

17 A. And discussion from the delta smelt working -- the  
18 biologists that were in the discussion feeling that there was  
19 very little difference between zero and minus 2000.

20 Q. And I understand that you were not there when those  
21 discussions took place; correct?

22 A. I was there right afterwards.

23 Q. And your understanding of the basis of why they thought  
24 there was no difference between zero and 2000 cfs upstream  
25 flow in the Old and Middle Rivers at this time was the

1 particle tracking method; correct?

2 A. That was one of the items that was looked at in discussion  
3 and there was other discussion points, but that was the main  
4 one. And although particle tracking is -- deals with an issue  
5 for how particles might move and behave, they felt that since  
6 you didn't see a difference, even with that model, that they  
7 felt that that was adequately protective.

8 Q. Ms. Goude, let me ask you with about the Fish & Wildlife  
9 Service's action two. Ms. Goude, is it your opinion that  
10 entrainment at the pumps increases when negative flows on the  
11 Old and Middle River approach or exceed 5,000 cfs upstream?

12 A. Yes.

13 Q. Now, if I could ask you to look at your first declaration  
14 dated July 9th, 2007. Actually, I'm sorry, it's the other  
15 declaration. August 3rd, 2007.

16 And particularly to Exhibit 1, which appears to be a  
17 figure about which we've had some discussion in these  
18 proceedings.

19 THE COURT: Is it Exhibit 1 to Exhibit 3? Because I  
20 have Federal Defendants' Exhibit 1 as Milligan declaration.  
21 It's Exhibit 1 to the Goude declaration.

22 MR. WALL: It's Exhibit 1 to the Goude declaration  
23 that's dated 8-3-2007, Your Honor.

24 THE COURT: Yes. And that is in evidence, Federal  
25 Defendants' 3. I have it.

1 BY MR. WALL:

2 Q. Ms. Goude, are you -- do you have that figure in front of  
3 you?

4 MR. MAYSONETT: Your Honor, I believe actually  
5 they're referring to DWR Exhibit D, which is the other Goude  
6 declaration.

7 THE COURT: All right. Bear with me. The Exhibit 1  
8 I'm looking at appears to be a delta smelt 2007 survey in  
9 progress. And it's a map of the Delta. That is not the  
10 Exhibit 1 you're looking at?

11 MR. WALL: No. I believe, according to our list,  
12 it's DWR Exhibit 4. It's a declaration --

13 THE COURT: DWR has letters, so it wouldn't be a  
14 number.

15 MR. WALL: Oh, is that -- D, I'm sorry. And it's  
16 declaration by Ms. Goude dated -- that was filed on August  
17 3rd.

18 THE COURT: I have it. You may proceed.

19 BY MR. WALL:

20 Q. Ms. Goude, you're familiar with this figure; correct?

21 A. Yes.

22 Q. And the Fish & Wildlife Service relied on this figure in  
23 preparing its action matrix; correct?

24 A. As well as other information and knowledge of the people  
25 looking at the information.

1 Q. Ms. Goude, this figure was developed by Dr. Peter Smith of  
2 the US Geological Survey?

3 A. Correct.

4 Q. Ms. Goude, does this figure represent a dramatic increase  
5 in take when flows approach or exceed negative 5,000 cfs on  
6 the Old and Middle River?

7 MR. WILKINSON: Objection. Vague and ambiguous.

8 THE COURT: All right. The objection to the phrase  
9 "dramatic" or the word is sustained. You may rephrase.

10 BY MR. WALL:

11 Q. Ms. Goude, does this figure represent an increase in take  
12 as the negative flows on the Old and Middle River approach  
13 minus 45 -- the negative flows approach 4500 or 5,000 cfs?  
14 It's different than the increase in take at lower levels of  
15 flow.

16 A. It appears it's around 5,000, but you can argue between  
17 4500 and 5,000. It's pretty hard to tell.

18 Q. Ms. Goude, how many data points are there below 4500 cfs  
19 negative flow on the Old and Middle River?

20 A. Three. And if you're not counting the ones that everybody  
21 talks about, the '97, '98, which were the high positive wet  
22 years.

23 Q. Right. So could you estimate for us what the negative  
24 flow on the Old and Middle River was in 1996 in reference to  
25 this chart?

1 A. Probably, I don't know, around 57.

2 Q. In 1996, Ms. Goude, the negative flow?

3 A. It was below 6,000, above 4,000.

4 Q. I'm sorry, Ms. Goude --

5 A. You said '96.

6 Q. Yes, Ms. Goude. What's labeled on the Y axis of this  
7 chart?

8 A. Salvage fish.

9 Q. And what's labeled on the X axis of this chart?

10 A. You're just wanting to know, I thought, what the flow is.

11 THE COURT: There's a pending question.

12 THE WITNESS: Okay.

13 THE COURT: The X axis represents what?

14 THE WITNESS: Oh, the salvaged fish and -- actually,  
15 that's the combined Old and Middle River flows and the salvage  
16 fish.

17 BY MR. WALL:

18 Q. So what was the combined negative flow on the Old and  
19 Middle River in --

20 A. I'm sorry.

21 Q. -- 1996?

22 A. It was under 4,000.

23 Q. Perhaps around 3800 cfs?

24 A. Perhaps.

25 Q. And what was the salvage that year?

1 A. It was under 6,000.

2 Q. And that salvage in 1996 at Old and Middle River flows of  
3 less than 4,000 cfs upstream exceeded the salvage in 2001;  
4 correct?

5 A. Correct.

6 Q. Exceeded the salvage in 1993; correct?

7 A. Correct.

8 Q. And was about the same as the salvage in 2002; correct?

9 A. Which year? Oh, the '96?

10 Q. Yes.

11 A. Approximately the same.

12 Q. So is it fair to say that the evidence before the Fish &  
13 Wildlife Service when it prepared its action matrix indicates  
14 that in some years of negative flow on the Old and Middle  
15 River during January and February, when the negative flow is  
16 approaching 4,000 cfs, the take might be as high as 5500 or  
17 rather the salvage might be as high as 5500 delta smelt?

18 A. Right. But you'd also have to pay attention to the  
19 indices, which I don't have -- I can't remember what they were  
20 and how many smelt were in the system, what the flow condition  
21 was, a number of other factors which there's been discussion  
22 about. And that's the other factors that they would look at.

23 Q. And do you have a personal understanding of what the  
24 abundance indices were in these years?

25 A. No, I don't remember.

1 Q. So as you sit here today, you have no basis for saying  
2 that take or salvage at the pumps in 1996 was something that  
3 might not recur at similar low flows in the future?

4 MR. BUCKLEY: Objection. Speculation.

5 MR. WALL: I'm asking if she has a basis.

6 THE COURT: She's asking -- he -- the question is  
7 asking for a basis. That doesn't call for speculation.  
8 You're able to answer this question; aren't you?

9 THE WITNESS: Yes.

10 THE COURT: Yes. Overruled. You may answer.

11 THE WITNESS: It could happen again. But whether  
12 that is considered a judgment on how the take is is difficult.  
13 Because although this -- that's why you look at all the  
14 information. For example, it depends on the water year type,  
15 what -- even though you may have an above normal or wet year,  
16 it depends on what time the high flows come. It depends on  
17 where the fish are when those flows arrive. So -- and it also  
18 depends on the -- what the index was at that time and  
19 whether -- what occurred in the year before and different  
20 information. So I'm just saying that, yes, that could  
21 reoccur, but you would need to look at other factors.

22 BY MR. WALL:

23 Q. Does the US Fish & Wildlife Service action matrix provide  
24 for flows -- I'll withdraw the question.

25 Does the US Fish & Wildlife action matrix action two

1 provide for a lower flow target in years depending on flow  
2 conditions?

3 A. Action two?

4 Q. Uh-huh.

5 A. No. It's -- it has a 4500 cfs and it has -- but there is  
6 a condition that offramps the trigger if it's a winter  
7 condition.

8 Q. So in the conditions you mentioned that might  
9 affect -- have affected the relatively high level of salvage  
10 in 1996, are those factored in to your action matrix action  
11 number two?

12 A. When you look at some of the graphs, there is -- it's very  
13 confusing to really see. There was some -- we did some  
14 independent analysis and it appears that between -- it's very  
15 difficult to see a change between 2,000 and 4,000. But that  
16 at around 5,000, you see the increase. Although the  
17 information is not perfect when it's looked just by itself.  
18 Based on the discussions, the hypotheses of the Delta Smelt  
19 Working Group and the scientists in our office, this was felt  
20 to be protective.

21 Q. Ms. Goude, I'm asking for your explanation.

22 A. I just gave it to you. Because it was based on  
23 information that I reviewed with Delta Smelt Working Group  
24 members, it was information that I discussed with members that  
25 I work with in my staff. I looked at the information, when I

1 looked at some of the information, there was very little  
2 difference at -- until around 5,000. When there is actually  
3 some dispute about it that some people have stated that they  
4 think it's at 6,000, minus 6,000. But the Fish & Wildlife  
5 Service thinks it's under 5,000.

6 Q. And Ms. Goude, in that discussion, was the figure at 1996  
7 discounted by your scientists for some reason?

8 A. No.

9 Q. So at least in some years, with flows under negative 4,000  
10 or flows less negative than negative 4,000 cfs on the Old and  
11 Middle River, there might be quite substantial take during  
12 this period; correct?

13 A. There might be take. Whether it's substantial, I don't  
14 know.

15 Q. Well, Ms. Goude, would you consider salvage of roughly  
16 5500 adult delta smelt in January and February to represent a  
17 substantial take?

18 A. Now, yes. Then, no.

19 Q. Ms. Goude, the Delta Smelt Working Group recommended a  
20 range of flows during this period. Correct?

21 A. If you look at the notes, the Delta Smelt Working Group  
22 discussed a lot of different items, so I'm not sure. And  
23 there was -- they met for periods of time on a weekly basis.  
24 So it really depends. And if you -- when you look at the  
25 notes, it changes from the August 21st to the August 30th,

1 it's basically -- and remember those delta smelt working  
2 notes, which people seem to interpret in many ways, are based  
3 on the year they're looking at. So it is -- it's a year  
4 specific water action. It is not meant necessarily as a  
5 recommendation for everything.

6           And then the other issue is that a lot of times the  
7 Delta Smelt Working Group would get questions from Water  
8 Operations Management Team and this group that's called the  
9 Data Assessment Team that would ask questions for the Delta  
10 Smelt Working Group to think about. So often, the input of  
11 the notes were based on information that other parties were  
12 asking them. So you really need to look at it in context of  
13 the whole.

14 Q. Ms. Goude, I appreciate that full discussion. I'm going  
15 to try to move through my questions as quickly as possible,  
16 and to accomplish that it would be very helpful if you  
17 answered the specific question I'm posing. Would that be  
18 okay?

19 A. Yes.

20 Q. Thank you.

21           THE COURT: Let me ask one question. If you know,  
22 was the effort of the team that you were not there for, in  
23 other words, the operations side of this, do you know whether  
24 there was any objective to balance the biological objectives  
25 with the water cost, was that considered? Or, as you said,

1 your focus of your team was strictly on biology and the  
2 species. Do you know if, in putting together this matrix of  
3 actions, that was a consideration?

4 THE WITNESS: It was -- it was discussed as -- at the  
5 beginning, that they had discussed some issues about water  
6 costs. When I came back from vacation, I was pretty adamant  
7 and directed them that that -- and even though they -- I don't  
8 supervise them, I directed them that that was not what they  
9 were supposed to be doing and that they should be purely  
10 looking at what they think are reasonable needs, including the  
11 issues as it related to salmon.

12 And so then, truthfully, I stopped paying attention  
13 to the discussions -- I mean, I'd be there when they talked  
14 about water costs, but really to me it was how to manage and  
15 allocate the resources, thinking about how you would be going  
16 in -- it was the worst case situation of a drought year and  
17 then what would I be concerned about for not just '08, but  
18 '09.

19 And so for myself, my concern was about delta smelt  
20 and then I was definitely told to pay attention to salmon,  
21 because NMFS was sitting next to us at the whole discussion.

22 THE COURT: And your focus was on protecting the  
23 species?

24 THE WITNESS: Yes, it was. And it was also worrying  
25 about the future actions for '09.

1 THE COURT: Thank you. You may continue.

2 MR. WALL: Thank you, Your Honor.

3 Q. Ms. Goude, were there representatives of the US Bureau of  
4 Reclamation involved in developing the action matrix?

5 A. Yes.

6 Q. And were there representatives of the Department of Water  
7 Resources involved in developing the action matrix?

8 A. The biologists that were involved, if I remember, from the  
9 Bureau was Dr. Mike Chotkowski, who, if I -- I'm seeming to  
10 have a memory lapse, but he's the chair of our recovery team.  
11 And there was Steve Ford, that has provided a declaration, was  
12 there. I don't remember who else. You have -- periods of  
13 time Anna Lubas-Williams who was there also because she's  
14 helping to develop the OCAP opinion. And there was Jim White  
15 from Fish & Game. And I -- you know, I'd have to look at my  
16 notes.

17 Q. Ms. Goude, my question was quite simple. Were there  
18 representatives of DWR involved in that decision making  
19 process?

20 A. Yeah. Steve Ford, I think it's Dr. Ford.

21 Q. Ms. Goude, did you order them not to consider water cost  
22 issues in developing these --

23 A. I can't order some other agencies, but I made it clear  
24 that they should be paying attention to what they need to do.  
25 Once they finished their charge, Fish & Wildlife Service took

1 the information and took it back over. But we wanted to get  
2 their input. And then we continued to share the information  
3 with Fish & Game throughout the process.

4 Q. Ms. Goude, I -- my question was a very simple one. You've  
5 now answered it, but we'll move through this much more quickly  
6 if you answer any question specifically.

7 A. Well, the Bureau of Reclamation -- I understand that the  
8 Bureau of Reclamation has both biologists and operators and we  
9 had a biologist there. And I just was clarifying that.

10 THE COURT: And the statement intent is that if  
11 you'll listen carefully to the question and then just respond  
12 to what the question asks you. If explanation is necessary,  
13 you can say "I have to explain." But if explanation isn't  
14 necessary, just answer the question directly if you could.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: Thank you.

17 THE WITNESS: You're welcome.

18 BY MR. WALL:

19 Q. Ms. Goude, directing your attention to action matrix  
20 action number three. That action provides for a daily  
21 upstream flow on the Nickel River of somewhere between zero  
22 and 4,000 cfs; correct?

23 A. Yes.

24 Q. And the process through which that flow somewhere between  
25 zero and minus 4,000 cfs will be determined is set out as

1 attachment -- in Attachment A of your declaration; correct?

2 A. Yes.

3 Q. Do I understand correctly that that process starts with  
4 the recommendation from the Delta Smelt Working Group?

5 A. Correct.

6 Q. And that following the delta smelt Working Group's proffer  
7 of a recommendation, the Fish & Wildlife Service makes the  
8 recommendation to the Water Operations Management Team?

9 A. Correct.

10 Q. And if the Water Operations Management Team agrees with  
11 the service's recommendations, that's what's carried out?

12 A. Correct.

13 Q. And in the event of disagreement, the project agencies  
14 comes up with their own proposal and provide that to the  
15 service; correct?

16 A. Correct.

17 Q. And if the service disagrees with the project agency's  
18 proposal, the service notifies the project agencies of that;  
19 correct?

20 A. Right.

21 Q. What happens if, at that point, the project agencies  
22 disagree with your agency's recommendation? The Fish &  
23 Wildlife Service has no authority to order the Bureau of  
24 Reclamation to carry out any particular action at this point;  
25 does it?

1 MR. WILKINSON: Objection. Compound.

2 MR. WALL: Let me rephrase the question, Your Honor.

3 THE COURT: The objection is sustained.

4 BY MR. WALL:

5 Q. If the Bureau of Reclamation and the California Department  
6 of Water Resources disagree with the US Fish & Wildlife  
7 Service's recommendation, the Fish & Wildlife Service does not  
8 have the authority to order the Bureau and California  
9 Department of Water Resources to carry out the Fish & Wildlife  
10 Service's recommendation; correct?

11 A. The way we wrote this is that the service would be the  
12 final call. But I don't know about their -- how you would  
13 interpret the authority since -- if it was a Biological  
14 Opinion, we could put it in a term and condition. But since  
15 it's through this process, I don't -- I don't know how it  
16 would legally -- I don't understand the legal ways you would  
17 do it.

18 Q. Ms. Goude --

19 THE COURT: Why don't we ask it a different way. To  
20 your understanding, if these actions were going to be  
21 implemented, this action matrix, who would, in effect, be the  
22 executive who would be directing the implementation of the  
23 action?

24 THE WITNESS: The Fish & Wildlife Service.

25 THE COURT: Thank you.

1 BY MR. WALL:

2 Q. Ms. Goude, did you testify yesterday that it was your  
3 opinion that the Fish & Wildlife Service would have the final  
4 say?

5 A. Well, yes. But I -- I've always assumed that that's how  
6 this was written.

7 Q. Is there anyone in a different agency who has a different  
8 opinion?

9 THE COURT: If you know.

10 MR. LEE: Objection. Calls for speculation.

11 THE COURT: Well, I already qualified it for you.  
12 You may answer if you know.

13 THE WITNESS: I really haven't asked them. You would  
14 have to ask them.

15 THE COURT: Without guessing, do you know?

16 THE WITNESS: No.

17 BY MR. WALL:

18 Q. Ms. Goude, could you please read the third sentence on the  
19 second page of Attachment A? Actually it's the third  
20 paragraph on the second page of Attachment A. The page at the  
21 top says page 17 of 24.

22 A. Is it Attachment A? I'm sorry.

23 Q. Yes, Ms. Goude, Attachment A.

24 A. And number three? Or in the --

25 Q. It's the sentence that's immediately above paragraph five.

1 It's the third paragraph on page 17.

2 A. Okay. "The service retains the right to recommend  
3 additional actions based on real time conditions."

4 Q. Thank you. Ms. Goude, are you familiar with Dr. Swanson's  
5 proposed protective measures number five and number seven?

6 A. Yes.

7 Q. These protective measures do not allow negative flows on  
8 the Old and Middle River to become as negative as the Fish &  
9 Wildlife Service's action; correct?

10 A. Correct.

11 Q. And do you believe that the action matrix action is  
12 preferable to Dr. Swanson's protective measures number five  
13 and number seven because the action matrix action is  
14 protective enough but maintains enough water to do other  
15 actions if you need to?

16 A. You're talking about our action?

17 Q. Yes. Do you believe that US Fish & Wildlife Service  
18 action three is preferable to Dr. Swanson's actions five and  
19 seven because the US Fish & Wildlife Service action is  
20 protective enough but maintains enough water to do other  
21 actions if you need to?

22 A. I think -- I -- I need to explain.

23 THE COURT: Try to answer the question first and then  
24 explain. It can be a qualified yes, it can be a no --

25 THE WITNESS: It's a qualified yes.

1 THE COURT: Then you can explain.

2 THE WITNESS: They're very similar. It's  
3 just -- it's a different way of looking at issues. I think  
4 that it really depends on the way the water year is looking.  
5 And it is difficult to answer it in isolation because, yes,  
6 for the agency, you're always looking at trying to deal with  
7 all the fishery needs to carry over storage for next year in  
8 addition. But Dr. Swanson's way of dealing with it was  
9 another way of analyzing it. And it's very similar.

10 BY MR. WALL:

11 Q. Ms. Goude, Dr. Swanson's upper limit on negative flows  
12 under this action is what?

13 A. Minus 2250.

14 Q. And the Fish & Wildlife Service's upper limit on negative  
15 flows under action three is what?

16 A. 4,000.

17 Q. Dr. Swanson's upper limit could be met simply by reducing  
18 export activities at the facilities; correct?

19 MR. LEE: Objection. No foundation.

20 THE COURT: The objection is sustained in part. Do  
21 you have knowledge to be able to answer this about whether  
22 reducing or stopping exports would achieve this objective?

23 THE WITNESS: In some time -- yes, some times of the  
24 year. It depends on the tide.

25 THE COURT: The tide?

1 THE WITNESS: Well, it depends -- the way the water  
2 operators have discussed it, there are some limitations in  
3 certain times of the year. But yes.

4 BY MR. WALL:

5 Q. So Ms. Goude, Ms. Swanson's -- rather, excuse me, Dr.  
6 Swanson's upper limit on negative flows, her actions five and  
7 seven, would not require the release of additional water from  
8 Shasta Reservoir; would it?

9 A. Not necessarily, no.

10 Q. It could be accomplished, barring exceptional tides, by  
11 reducing exports of the state and federal export facilities;  
12 correct?

13 A. Yes. But there could be -- I have a qualification. My  
14 understanding is there can also be some problems when you get  
15 to safety issues as it relates to San Luis as well as safety  
16 issues as it relates to the facilities.

17 Q. Ms. Goude, what do you mean by saying that action matrix  
18 three is protective enough, but maintains enough water to do  
19 other actions if you need to?

20 A. Well, at a certain point, you still have to pump water,  
21 export water for health and safety purposes. There's both M&I  
22 and ag and people, I guess, need water. And the point of the  
23 matter is that you, at a certain point, if it doesn't rain,  
24 are going to have some limitations in the system.

25 Q. Is it --

1 A. So it's not about water costs, it's about how you would  
2 deal with water year 2009.

3 Q. Ms. Goude, you haven't calculated at what point you would  
4 impose on public health and safety; have you?

5 A. That's up to others, not me.

6 Q. And you haven't seen any such calculations; have you?

7 A. No.

8 Q. So maintaining enough water for public health and safety  
9 was not the reason for the Fish & Wildlife Services choice of  
10 an upper limit of minus 4,000 cfs on negative flows in its  
11 action matrix action three; correct?

12 A. No, it was based on the biology.

13 Q. And also on maintaining enough water to do other actions  
14 if you need to; correct?

15 MR. WILKINSON: Asked and answered.

16 THE COURT: We'll have it answered specifically. Do  
17 you agree or disagree with that question?

18 THE WITNESS: Yes. I agree.

19 BY MR. WALL:

20 Q. Maintain enough water where, Ms. Goude?

21 A. It's not a very simple answer. It really depends on the  
22 storage, what you have going on in the different systems.  
23 After working on OCAP for three years to get to a class  
24 project description, I realize how interrelated basically all  
25 the hydrology is in the system. So where you affect Shasta,

1 it affects one aspect. Trinity flows going back down the  
2 Trinity affected how you dealt with the Sacramento River. And  
3 that's part of what this new analysis will have to unravel.

4 Q. Ms. Goude, you haven't done that modeling; correct?

5 A. We did the model. I don't do the modeling, but we  
6 analyzed it in the 2005 Biological Opinion and then the BA.  
7 And currently the modeling is being done for the next  
8 Biological Opinion.

9 Q. Are you aware of modeling having been completed on what  
10 reservoir storage will be under the Fish & Wildlife Service's  
11 action matrix?

12 A. They may have, but I don't know.

13 Q. Ms. Goude, if plaintiffs -- if Dr. Swanson's or Fish &  
14 Wildlife Service's suite of actions were taken to moderate Old  
15 and Middle River flows to protect delta smelt, what would be  
16 the effect on upstream storage volumes compared if those  
17 actions were not taken?

18 A. It depends on the water year. I really don't know. But  
19 there could be -- there could be an effect on storage. But I  
20 actually think that you could do both of those without having  
21 an effect.

22 Q. Ms. Goude, would Dr. Swanson's proposed matrix five and  
23 seven be necessary in a wet year?

24 A. I don't think so.

25 Q. Have you done any analysis to determine that?

1 A. No. But that's based on basically quite a bit of  
2 discussion. And in certain wet years, you don't need that  
3 because there's no negative flows. It depends on when it  
4 rains, though, too.

5 Q. So if there were no negative flows because of the wet  
6 year, would Dr. Swanson's flow targets be met by virtue of  
7 runoff?

8 A. It should.

9 Q. Ms. Goude, if I could ask you to return to your action  
10 matrix. And focus for a moment on the box under the action  
11 column in the row for action three. Do you have it in front  
12 of you, Ms. Goude?

13 A. Yeah.

14 Q. Do you see the line about four lines down that says,  
15 "Actual flow to be determined based on the real-time data  
16 estimated spawning distribution and the susceptibility of a  
17 substantial portion of the population to the effects of the  
18 project operation"?

19 A. Yes.

20 Q. What's your understanding of the phrase "a substantial  
21 portion of the population," "susceptibility of a substantial  
22 portion of the population"?

23 A. It would be -- it would be a determination based on real  
24 time monitoring and information from the various trawls and  
25 the Delta Smelt Working Group meeting to discuss this and

1 making a biological -- the service making a biological  
2 determination based on the best scientific information at the  
3 time. It's not defined per se.

4 Q. Ms. Goude, I understand that those are the sources of  
5 information that would be considered by the service; correct?

6 A. Correct.

7 Q. At what point -- what portion of the population of delta  
8 smelt is a substantial portion?

9 A. Well, we don't go by population even though we use those  
10 words loosely, but it would be based on the indices or  
11 information on distribution, current distribution.

12 So if we saw that the larger portion of distribution  
13 was towards the south Delta, you would have to make a  
14 judgment. It would be a judgment call on what we would  
15 consider substantial.

16 Q. So if 75 percent of the population was, based on  
17 distribution information, susceptible to entrainment, would  
18 that be a substantial portion?

19 A. I would think so.

20 Q. If 50 percent of the population were at risk of  
21 entrainment, would that be a substantial portion?

22 A. It might be. It depends. It depends whether you're  
23 talking about the central Delta or the south Delta. Maybe  
24 that's a mid action.

25 Q. Ms. Goude, perhaps we could be just a little bit more

1 speci fic. Are you fami liar with the exi stence of certain  
2 sampl ing stati ons in the Del ta?

3 A. Roughly. Not totally.

4 Q. Are you fami liar with the locati on of Stati on 815?

5 A. No.

6 Q. Ask you to assume it's in the central Del ta.

7 A. Okay.

8 Q. And I'm going to assume -- ask you to assume that this is  
9 a dry year. And I'm going to ask you to assume that larval  
10 del ta smelt are detected around Stati on 815 in mid to late  
11 March.

12 Under your action three, what level of negative flows  
13 would be chosen for the Old and Middle River?

14 A. At the station -- is your idea of central Del ta closer to  
15 Frank's Tract?

16 Q. It's in the central Del ta.

17 A. Okay. I'm going to assume it's close to Frank's Tract.

18 Then it depends on -- you're asking, then, the actual process  
19 would be to look at the distribution, the information, to see  
20 if there's any ideas of what the population levels are and how  
21 long you would need to deal with it. And probably they would  
22 make an estimate. And I can't proffer what it would be, but  
23 it could be closer to the lower more protective range. It  
24 would --

25 THE COURT: All right. At this time we're going to

1 interrupt the testimony. I have to take up the criminal  
2 matter that I mentioned. I would expect that about hopefully  
3 9:40 we'll be ready to resume.

4 MR. WALL: Thank you, Your Honor.

5 THE COURT: You can leave your papers where they are.

6 (Recess.)

7 THE COURT: Please be seated. We're back on the  
8 record in NRDC versus Kempthorne. We're resuming the  
9 testimony of Ms. Goude. Mr. Wall, you may continue.

10 BY MR. WALL:

11 Q. Hello again, Ms. Goude.

12 Ms. Goude, there were non-biologists who participated  
13 in the development of the action matrix; correct?

14 A. There was -- they were present. I don't know.

15 Q. They were silent during the discussions; correct?

16 A. Generally when you put those groups together, they're  
17 never silent, no.

18 Q. Ms. Goude, no modeling was done to determine whether the  
19 Fish & Wildlife Service's action matrix would have an impact  
20 on cold water storage for salmon; correct?

21 A. Not that I'm aware of.

22 Q. And no such modeling was done with respect to the  
23 plaintiffs' action matrix; correct?

24 A. Not that I'm aware of.

25 Q. But calculations of water costs of the different actions

1 were made; correct?

2 A. By various parties, yes.

3 Q. Including by Mr. John Leahigh of the California Department  
4 of Water Resources; correct?

5 A. Right.

6 Q. Mr. John Leahigh was a participant in the development of  
7 the action matrix; correct?

8 A. He wasn't in the group that was originally at the early  
9 meetings. Later on we had meetings where they did talk about  
10 that. But he wasn't with the biologists.

11 Q. And he was a participant in those meetings; correct?

12 MR. LEE: Objection, Your Honor, ambiguous as to  
13 which meetings.

14 THE COURT: The last question referred to "early  
15 meetings." Is that what you intended to refer to?

16 BY MR. WALL:

17 Q. Ms. Goude -- I'll reframe the question, Your Honor.

18 THE COURT: Thank you.

19 BY MR. WALL:

20 Q. Ms. Goude, John Leahigh contributed to the development of  
21 the action matrix; correct?

22 A. He provided information on the running averages.

23 Q. So the answer to my question is yes; correct?

24 A. On the running averages, yes.

25 Q. He provided information regarding the action matrix in

1 addition to on the running averages; correct?

2 A. I don't remember -- everybody had meetings, the Fish &  
3 Wildlife Service had the ultimate say on the action matrix.

4 Q. Ms. Goude, I'm sorry, were you not done?

5 A. Well, I need to explain. You keep asking me a question  
6 that is -- that he provided the input that we took, that we  
7 included in the matrix had to do with the running averages.  
8 The rest of the matrix was developed internally within the  
9 Fish & Wildlife Service. It was shared. But the ultimate  
10 decision rested with the Fish & Wildlife Service.

11 MR. WALL: Madam reporter, would you please read back  
12 my question?

13 (Record read as requested.)

14 THE WITNESS: No. He provided information on the  
15 running averages.

16 BY MR. WALL:

17 Q. And that's the only information he provided to you, Ms.  
18 Goude?

19 A. They talked about things --

20 MR. LEE: Objection. Asked and answered.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: There were numerous meetings where we  
23 shared information between the Bureau of Reclamation, DWR and  
24 Fish & Game. Ultimately the action matrix that was presented  
25 in my declaration was Fish & Wildlife Service's.

1 BY MR. WALL:

2 Q. Ms. Goude, if you could answer my question yes or no. And  
3 if you need to add an explanation after that, I'd appreciate  
4 it. If you did. But if you could begin by answering yes or  
5 no, I'd appreciate that.

6 Did Mr. Leahigh contribute information to the  
7 development of the action matrixes other than information on  
8 running averages? Yes or no.

9 A. Yes. Can I have an explanation?

10 THE COURT: I'm not sure that the question needs a  
11 further explanation.

12 THE WITNESS: I remembered something.

13 THE COURT: If, to make the answer not misleading,  
14 you need to explain, you may.

15 THE WITNESS: There was also discussion on what would  
16 be considered a wet water year. And that was on the  
17 Sacramento River, the high flow events. So that was also  
18 provided by the operators to try and define what a flow  
19 event -- what a wet year was. Because we had just -- the  
20 biologists just had referred to it as a wet year.

21 BY MR. WALL:

22 Q. Ms. Goude, who provided information on whether action  
23 matrix action number three would maintain enough water to do  
24 other actions?

25 A. Could you repeat that?

1 Q. Yes, Ms. Goude. Who provided information on whether the  
2 Fish & Wildlife Service's action matrix action number three  
3 would maintain enough water to do other actions?

4 A. There hasn't really been a calculation of that nature.

5 Q. Ms. Goude, action matrix action number three allows a  
6 higher export rate than Dr. Swanson's proposed actions number  
7 five and seven; correct?

8 A. You mean higher negative flow?

9 Q. Yes. Correct.

10 A. Yes.

11 Q. And a higher negative flow is consistent with allowing  
12 higher export rates; correct?

13 A. Yes. It can be.

14 Q. How is allowing a higher export rate more protective of  
15 salmon?

16 A. At a certain point -- and I'm not a hydrologist. At a  
17 certain point, even with exports that are going on in the  
18 system, as you draw down for health and safety and water  
19 quality, other water quality parameters, there's certain water  
20 quality control plan requirements that are going on. At a  
21 certain point, there's just not enough water. And that's  
22 assuming it's a below normal or dry year. And so it really  
23 depends on the hydrology of the system.

24 In a wet year, you're correct. In an above normal  
25 year, you're probably correct. But in -- especially if it

1 goes into a below normal year after we've had one this year,  
2 that's where the concern -- the difficulty of the situation.  
3 That's a real simplistic explanation.

4 Q. Ms. Goude, who provided information on that subject?

5 A. I have had to do the Biological Opinion since the listing  
6 of the delta smelt. And I've -- and because I've had to do it  
7 repeatedly, I have personal knowledge from sitting at probably  
8 more than 300 meetings discussing this.

9           So after three years of developing the '05 opinion,  
10 I -- and sitting next to hydrologists for that period of time,  
11 I've picked up personal knowledge of the system.

12 Q. Ms. Goude, at what export rate would health and safety be  
13 jeopardized?

14 A. I don't know the export rate. I am just telling you the  
15 simplistic explanation, sir.

16 Q. So you don't know if, at Ms. Swanson's proposed export  
17 rates or proposed negative flows, there would be an impact on  
18 health and safety; do you?

19 A. It would depend on the storage of the system, what the  
20 water year type and many other factors that go into it.  
21 That's all I'm saying.

22 Q. And you have not conducted any calculations of those  
23 values; correct?

24 A. You really can't until we have a better idea of the water  
25 year type coming in to.

1 Q. Ms. Goude, as a general matter, lower export rates reserve  
2 more water in the reservoirs; correct?

3 MR. LEE: Objection, Your Honor, no identification of  
4 which reservoir he's referring to.

5 THE COURT: It's a general premise. I think the  
6 question can be answered in the form that it's propounded.  
7 The objection is overruled. Can you answer?

8 THE WITNESS: You're asking --

9 THE COURT: As a matter of your personal knowledge  
10 about the system, if you have lower export rates in the  
11 projects, does that result in deeper or higher storage?

12 THE WITNESS: It depends on what the releases would  
13 be needed for certain contractors and certain things, that  
14 sometimes they have prior rights or instream rights, you know.  
15 Certain ones are heavy -- now I can't think of what they're  
16 called. Like exchange contractors or the ones that have water  
17 rights on the Sacramento River.

18 THE COURT: But all things being equal, if you're  
19 exporting less, what's the effect on storage in reservoirs?

20 THE WITNESS: If you're exporting less, the storage  
21 could stay the same.

22 BY MR. WALL:

23 Q. All things being equal, if you're exporting less water out  
24 of the Delta, less water needs to be re -- excuse me. Let me  
25 try that again.

1 All things the same, if you're exporting less water  
2 out of the Delta, you would need to release less water from  
3 upstream reservoirs; correct?

4 MR. BIRMINGHAM: Objection. Lacks foundation.

5 THE COURT: Are you able to answer this question?

6 THE WITNESS: It -- not really.

7 THE COURT: Sustained.

8 BY MR. WALL:

9 Q. Ms. Goude, you don't know how Dr. Swanson's proposed flow  
10 regime would affect reservoir storage; do you?

11 A. Which flow regime, which action are you talking about, all  
12 of them?

13 Q. Ms. Goude, you don't know how Dr. Swanson's proposed flow  
14 regime for the Old and Middle Rivers would affect reservoir  
15 storage; do you?

16 A. No.

17 Q. Ms. Goude, are you familiar with Dr. Bennett's research  
18 findings that very few delta smelt hatched prior to VAMP  
19 survive?

20 A. I'm aware of it, yes.

21 Q. And you relied on those research findings in developing  
22 the action matrix; correct?

23 A. As well as other information.

24 Q. Are you aware that the average Old and Middle River flow  
25 during the VAMP period is approximately 1500 cfs upstream?

1 A. I've heard that.

2 Q. I'm going to ask you to assume that that's true. Now, the  
3 US Fish & Wildlife Service action would allow flows on the Old  
4 and Middle River prior to VAMP period that are more negative  
5 than 1500 cfs upstream; correct?

6 A. Correct.

7 Q. In fact, US Fish & Wildlife Service action three would  
8 allow flows on the Old and Middle River prior to the VAMP  
9 period as high as 4500 cfs on a seven-day running average;  
10 correct?

11 A. Correct.

12 Q. And those flows would be three times more negative than  
13 the average Old and Middle River flows during the VAMP period;  
14 correct?

15 A. Correct.

16 Q. So those flows permitted by Fish & Wildlife Service action  
17 three would be three times more negative on the Old and Middle  
18 River than during the only period when, according to Dr.  
19 Bennett's research, delta smelt larvae survive; correct?

20 A. Correct.

21 Q. Do you have any specific basis for believing that delta  
22 smelt hatched prior to the VAMP period will survive if Old and  
23 Middle River flows are three times more negative than during  
24 VAMP?

25 A. You're looking at -- also you're relying on Bennett's

1 study on VAMP assuming -- he was showing that during that  
2 period of time that there was a relationship. It doesn't  
3 necessarily mean that a higher negative flow would not have  
4 the same result. It's basically showing a time in place that  
5 that is the case. So it really -- his was an incidental look  
6 at a situation. And remember, the Fish & Wildlife Service has  
7 always thought that the VAMP is important or beneficial effect  
8 for delta smelt.

9 MR. WALL: Madam reporter, would you please read back  
10 my question.

11 (Record read as requested.)

12 THE WITNESS: I thought I answered it.

13 MR. WALL: I think it's a yes or no question.

14 MR. WILKINSON: Asked and answered, Your Honor.

15 THE COURT: Well, apparently her answer is with  
16 qualification. And is this a yes with a qualification?

17 THE WITNESS: It's a yes with a qualification.

18 THE COURT: And you gave the qualification.

19 THE WITNESS: Yes.

20 BY MR. WALL:

21 Q. Ms. Goude, could I ask you to look at the action matrix of  
22 the Fish & Wildlife Service, and particularly action four.

23 A. Yes.

24 Q. Am I correct that the action identified as action four is  
25 evaluation of real time delta smelt data to recommend an

1 action to protect juvenile delta smelt?

2 A. Correct.

3 Q. Ms. Goude, what specific action to protect fish or to  
4 protect delta smelt would be required under action four?

5 A. Depending on entrainment and export reduction, curtailment  
6 of pumping.

7 Q. Is there anything on the action matrix that specifies  
8 that?

9 A. No. You have to go to that Attachment B, the process, and  
10 then also look at some of the other information.

11 Q. What other information would that be?

12 A. Well, you also -- even though you use Attachment B as the  
13 process, you're supposed to look at the -- the footnotes for  
14 Attachment B of Exhibit 2 as well as some of the information  
15 that was in Attachment A for action three is also used.

16 Q. Could you point me to anything in those various documents  
17 that you've mentioned that requires any specific action to  
18 protect delta smelt other than that process?

19 A. Well, you -- you have five days of provisional pumping.

20 Q. Where are you looking, Ms. Goude?

21 A. On the Attachment B. You go up. And if there's smelt in  
22 the last five days of smelt, you have provisional pumping.  
23 And then if there's smelt in the -- smelt in the salvage  
24 that's yes, you convene the working group to provide the input  
25 to WOMET and the service makes the decision. And then you

1 modify the operations on footnote based on the information and  
2 issues on that footnote for Attachment B of Exhibit 2.

3 Q. I'm sorry. At what point do pumping levels change?  
4 What's the specific trigger for that?

5 A. It would be -- there's not a -- you're looking for an  
6 actual point, basically it's a process. And that if there's  
7 take occurring, then you would have export reduction and the  
8 service would then provide those as a -- as a point to the  
9 operators.

10 Q. Where in this document does it say that if take is  
11 occurring, pumping would be curtailed?

12 A. Well, I guess I assume that maybe -- I guess I see where  
13 service makes decision, footnote G through H.

14 Q. As it says, the service retains the right to recommend  
15 additional actions based on real time fish; correct?

16 A. Correct.

17 Q. So the service would be making the recommendation;  
18 correct?

19 A. I guess it's how you -- I would view retains the right  
20 to -- yes. That's correct.

21 Q. And this document does not specify what that  
22 recommendation would be; correct?

23 A. No, it does not.

24 Q. It does not specify that if take is occurring, export  
25 pumping would be curtailed; correct?

1 A. No. But that was my presumption.

2 Q. Is it your view that the process I laid out in Fish &  
3 Wildlife Service action matrix action four and the various  
4 attachments is different than the DSRAM process because it  
5 provides more sideboards?

6 A. That was what we were trying for, yes.

7 Q. And those side boards are purely procedural; are they not?

8 A. I think the procedural is that the service makes the  
9 recommendation where before it was vague and it said they may  
10 and should.

11 Q. But now it's clear that the service would make the  
12 recommendation; correct?

13 A. That is my opinion.

14 Q. Do other people have a different opinion?

15 A. Oh, I would imagine there's a lot of opinions. But from  
16 the way the Fish & Wildlife Service developed it, that was our  
17 opinion for the service.

18 Q. Nothing in this document states that the action agencies  
19 would be obligated to follow the Fish & Wildlife Service's  
20 recommendation; correct?

21 A. No.

22 Q. Ms. Goude, do you have in front of you Dr. Swanson's  
23 declaration of August 13th, 2007?

24 A. Yes.

25 Q. If you could look at her proposed protective measures

1 which were set out in an appendix to the declaration.

2 A. Her matrix?

3 Q. She doesn't call it a matrix, but sure.

4 A. Okay.

5 Q. Her set of measures.

6 A. Right. Okay.

7 Q. And could you look particularly at figure -- or rather at  
8 action number seven.

9 Ms. Goude, when would action seven terminate under  
10 Dr. Swanson's proposal?

11 A. At June 15th for a minimum of five days after the last  
12 detection of larval or juvenile delta smelt at either the CVP  
13 or State Water Project --

14 THE COURT: Not quite so fast, please.

15 THE WITNESS: I'm sorry. June 15th or a minimum of  
16 five days after the last detection of larval or juvenile delta  
17 smelt at either the State Water Project or Central Valley  
18 Project fish protective facilities by either the salvage or  
19 larval monitoring program, whichever comes first.

20 BY MR. WALL:

21 Q. Ms. Goude, do you have there DWR Exhibit F? It's a -- it  
22 actually is marked as Exhibit F, but I believe it says at the  
23 top, Exhibit D and it's --

24 A. This --

25 Q. -- a chart. It says at the top, "Analysis of last date of

1 delta smelt salvage by Banks Pumping Plant and Jones Pumping  
2 Plant."

3 A. I have it.

4 Q. What was the last date of salvage in 1995?

5 A. April 12th.

6 Q. And what was the last date of salvage in 2006?

7 A. April 22nd.

8 Q. And were both of those years wet years?

9 A. Correct.

10 Q. Is it reasonable to assume that in a wet year, the last  
11 date of salvage might be before June 15th?

12 A. I would assume, based on the existing salvage versus Dr.  
13 Swanson's new methodology. But based on this information,  
14 yes.

15 Q. So under those conditions, Dr. Swanson's action number  
16 seven would end on June 15th; correct?

17 A. Yes. Can I -- I have an explanation, a concern  
18 explanation. It depends on if you are monitoring for under 20  
19 millimeters. I didn't -- this information is just based on  
20 the existing salvage information; correct?

21 Q. Ms. Goude, the service does not presently monitor for  
22 delta smelt under 20 millimeters in salvage tanks; correct?

23 A. Correct.

24 Q. So the service doesn't know how many delta smelt under 20  
25 millimeters are being entrained at the pumps; correct?

1 A. Yes.

2 Q. Ms. Goude, could I ask you to look at your proposed action  
3 number five. And compare that to -- let me ask you this  
4 question: Do you see any difference between Fish & Wildlife  
5 Service action five and Dr. Swanson's proposed measures eight  
6 and nine?

7 A. No, I really don't.

8 Q. Please focus your attention on Dr. Swanson's measure eight  
9 and read what it says the action is.

10 A. "Prohibit installation or tidal operation of the three  
11 south Delta agricultural barriers."

12 Q. Now, please read your proposed action number five and what  
13 it says about the south Delta agricultural barriers.

14 A. Well, mine is one thing. But it's "no installation of the  
15 Spring Head of Old River Barrier and flap gates tied open on  
16 south Delta agricultural barriers."

17 Q. Ms. Goude, there is a difference between not installing  
18 agricultural barriers and tying open the flap gates on those  
19 agricultural barriers; is there not?

20 A. Well, I'm sorry, I guess I read Dr. Swanson's thing as  
21 prohibit installation. And then I saw "or tidal operation of  
22 the three Delta agricultural barriers." So I guess I saw the  
23 "or" as meaning you could put the barriers in, but  
24 not -- leave them tied open. So that's how I interpreted  
25 that.

1 Q. If Dr. Swanson's action were designed to prevent  
2 installation of the agricultural barriers, would there be a  
3 difference between your action and her action?

4 A. If -- if it's -- there was no "or"? Is that what you're  
5 saying? Say it again.

6 Q. Let me ask it this way: Does the installation of tidal  
7 barrier or of the agricultural barrier influence the way tides  
8 flow in and out, even if the flap gates are open?

9 A. The -- unfortunately for salmon, the barrier that really  
10 causes some of the adverse effects is the Head of Old River  
11 Barrier. That's the one that shows the biggest problems. So  
12 you have localized effects. But what really changes the  
13 velocities, the hydrology of the system is the Head of Old  
14 River, which is a salmon one.

15 Q. I'm focusing here on the agricultural barriers and delta  
16 smelt.

17 A. I just was answering you.

18 Q. Ms. Goude, if I could frame the question again. Do  
19 the -- does the installation of an agricultural barrier, with  
20 its flap gates tied open, influence the way the tides operate  
21 through that barrier?

22 A. On a localized basis, yes.

23 Q. And that could lead to some delta smelt that are swept  
24 through the barrier not being swept back; correct?

25 A. That could happen.

1 Q. So -- I'll withdraw that question.

2 Ms. Goude, in your view, Dr. Swanson's proposed  
3 protection measures would adequately protect delta smelt from  
4 potential adverse effects associated with the diversion of  
5 water from the Delta by the CVP and State Water Project during  
6 the 2008 water year; correct?

7 A. Yes.

8 Q. Dr. Swanson's proposed protective measures would provide  
9 somewhat stronger measures for protection for delta smelt than  
10 the US Fish & Wildlife action matrix; correct?

11 A. Yes.

12 Q. In fact, you stated that they would go -- or is it your  
13 view that they would go beyond the minimum necessary to  
14 protect delta smelt from potential adverse effects associated  
15 with the diversion of waters from the Delta by the water  
16 projects during the 2008 water year?

17 A. I don't remember exactly how I stated it in my  
18 declaration, but they are more protective.

19 Q. Have you analyzed whether Dr. Swanson's proposals go  
20 beyond the minimum necessary to protect delta smelt? If they  
21 were to remain in place longer than the 2008 water year.

22 A. Pardon me? Repeat. I was looking for something, I'm  
23 sorry.

24 Q. Sure. I'll be happy to.

25 You have not analyzed whether Dr. Swanson's proposals

1 go beyond the minimum necessary to protect delta smelt if they  
2 were to remain in place longer than the 2008 water year;  
3 correct?

4 A. Correct.

5 Q. And you have not analyzed whether Dr. Swanson's proposals  
6 go beyond the minimum necessary to address impacts on delta  
7 smelt from CVP and State Water Project operations other than  
8 diversions from the Delta; correct?

9 A. Right.

10 Q. Ms. Goude, during the fall, the projects must meet certain  
11 outflow requirements established by the State Water Board  
12 under its decision D 1641; correct?

13 A. Yes.

14 Q. What would be the position of X2 -- you're familiar with  
15 the concept of X2; correct?

16 A. Correct.

17 Q. What would be the position of X2 with outflows that  
18 minimally meet the requirements of D 1641?

19 A. I really don't know if they have looked at the -- they  
20 mainly have -- I'm going by memory. They have some outflow  
21 discussions as it relates to flows from the American, minimum  
22 flows on the Sacramento River and those kinds of things. I  
23 don't remember -- I don't think they have an X2 portion and I  
24 don't remember.

25 Q. So you don't know what the position of X2 would be under

1 the minimum flows required in the fall by D 1641?

2 A. I don't remember what the flows are under D 1641 for the  
3 fall. I would need to look at that. But one of the things  
4 that we are -- but there are flow requirements off the  
5 different rivers that contribute to the Delta. That's the  
6 part I remember.

7 Q. Ms. Goude, in some years in which the projects have  
8 complied with the outflow requirements of D 1641, the X2 point  
9 has been located upstream of Kilometer 80 during the fall;  
10 correct?

11 A. Correct.

12 Q. And are you aware of the delta smelt Working Group's  
13 findings that habitat quality for delta smelt was reduced when  
14 the position of X2 was upstream of kilometer 80 in the fall?

15 A. They weren't findings. They were discussions. They had a  
16 lot of discussions and hypotheses about that. That's  
17 something that is actually being analyzed in the current B0.

18 Q. Ms. Goude, do you have a copy of Plaintiffs' Exhibit 10  
19 there with you? It's a document that says at the top, "Delta  
20 Smelt Working Group Meeting Conference Call Minutes, August  
21 21, 2006."

22 A. Which one, August?

23 Q. August 21, 2006. It's a document of approximately five or  
24 six pages in length. And it would have been marked as  
25 Plaintiffs' Exhibit 10.

1 A. Nothing's in order up here. The August 21st one?

2 Q. Yes, Ms. Goude. Do you now have that?

3 A. Correct.

4 Q. Could you please turn to the fifth page, which has a  
5 Figure 2 on it.

6 Looking at Figure 2, would the fall habitat index be  
7 higher or lower -- let me ask it this way: When X2 is  
8 upstream of Kilometer 80 on this figure, is the habitat  
9 quality index generally lower than when X2 is at or upstream  
10 of Kilometer 80?

11 A. It's generally -- you're asking me upstream. At  
12 approximately 85, it would be around .15.

13 Q. What I'm asking you is if X2 is upstream of Kilometer 80,  
14 is the habitat index usually lower than if X2 is at or  
15 downstream of Kilometer 80?

16 A. It's usually -- it's lower. Sorry.

17 Q. Thank you. Ms. Goude, do you have an opinion on whether  
18 the CVP and State Water Project operations, as modified to  
19 conform to your action matrix, would jeopardize the delta  
20 smelt?

21 A. No. Because we haven't done a jeopardy analysis.

22 Q. Ms. Goude, the threats of destruction, modification or  
23 curtailment of delta smelt habitat resulting from the  
24 operations of SWP and CVP could result in the extinction of  
25 the delta smelt; correct?

1 A. It could.

2 Q. Ms. Goude, do you have in front of you the document marked  
3 as Plaintiffs' Exhibit 13, which is the five-year status  
4 review with a cover letter?

5 A. I had it yesterday. Yes.

6 Q. And could you read the first sentence of the second  
7 paragraph there that begins with paragraph -- with "The  
8 threats."

9 A. The cover letter?

10 Q. Uh-huh.

11 A. The second paragraph on the first page?

12 Q. Uh-huh.

13 A. "In conducting this review, the service utilized the  
14 information and analysis presented in the delta smelt and the  
15 State of the Sciences, which was prepared by the San Luis and  
16 Delta-Mendota Water Authority 2002. This document provided  
17 some new perspectives on existing data, and we greatly  
18 appreciated the analyses that were conducted. Although we  
19 could not agree with all of the conclusions reached in this  
20 white paper, we agree with you on several key points which are  
21 described below."

22 Q. I'm sorry, I was referring to the paragraph before that,  
23 so if you could just read --

24 A. Did you like that one?

25 Q. Well, we could go on and talk about that if we have time,

1 but --

2 A. So it's the first paragraph you want?

3 Q. Yeah, it's the one that begins "The threats." I'm sorry.  
4 It's just above the one you read.

5 A. Okay. Obviously you're not on the cover letter.

6 Q. I'm on page 28. I'm sorry. I must have misheard you. I  
7 thought you were -- I think there's a paragraph that's quite  
8 similar to the one you just read --

9 A. Really?

10 Q. -- on page 28. So please look at page 28 and if I  
11 misspoke and gave you the wrong page, I do apologize.

12 A. Page 28?

13 Q. Yeah. "The threats of the destruction."

14 A. "The threats of the destruction, modification or  
15 curtailment of its habitat or range resulting from extreme  
16 outflow condition (reduced outflow or high outflow) and/or the  
17 operations of the state and federal water projects could  
18 result in the extinction of the delta smelt." Reference "CDFG  
19 2003g and Moyle 2002, 2003." End of parens, period.

20 Q. Ms. Goude, Dr. Moyle is the foremost expert on delta  
21 smelt; correct?

22 A. Yes. One of them.

23 Q. Ms. Goude, you were involved in the preparation of the  
24 Biological Opinion dated -- that came out in February, 2005,  
25 on the operations of the projects; correct?

1 A. Correct.

2 MR. WALL: Your Honor, may I approach?

3 THE COURT: Yes, you may.

4 BY MR. WALL:

5 Q. Ms. Goude, I've handed you excerpts from the document. Do  
6 you recognize these excerpts?

7 A. Yes.

8 Q. What are they?

9 MR. BIRMINGHAM: Excuse me, Your Honor, has this  
10 document been marked as an exhibit?

11 MR. WALL: Yes. I'm sorry. We'd like to mark this  
12 as Plaintiffs' 13?

13 THE COURT: 14.

14 MR. WALL: 14.

15 THE COURT: Be marked as Plaintiffs' 14 for  
16 identification.

17 (Plaintiffs' Exhibit 14 was marked for  
18 identification.)

19 BY MR. WALL:

20 Q. Ms. Goude, do you recognize the excerpts of these  
21 documents?

22 A. It's the cover memo that attaches that starts it off, yes.

23 Q. And what's the -- the cover memo to which, I'm sorry?

24 A. The Biological Opinion for February of '05.

25 Q. And could you look at the second page of Plaintiffs' 14.

1 A. "In his August" -- oh, I'm sorry. Yes.

2 Q. And you recognize that as well?

3 A. I recognize it. I don't remember it.

4 Q. All right. It's a page from the Biological Opinion;  
5 correct?

6 A. Correct.

7 Q. That you authored or supervised the production of;  
8 correct?

9 A. Yes.

10 Q. Ms. Goude --

11 A. Oh, I see.

12 Q. In this document, let me just ask you to read the sentence  
13 you began to read, which says, "In his August 24, 2003."

14 A. "In his August 24, 2003 letter, the foremost delta smelt  
15 expert Dr. Peter B. Moyle, stated that the delta smelt should  
16 continue to be listed as a threatened species (Moyle 2003).  
17 In addition, in their January 23rd, 2004 letter, Fish & Game  
18 fully supported that the delta smelt should retain its  
19 threatened status under the Act."

20 Q. Thank you, Ms. Goude. Turning back to the five-year  
21 status review and the paragraph we were reading on page 28.  
22 Is it true that any one of many stochastic factors that affect  
23 delta smelt, including entrainment losses to water diversions,  
24 can cause the numbers of delta smelt to move toward  
25 extinction?

1 A. That's true.

2 Q. Let's go to -- yesterday you testified that the Fish &  
3 Wildlife Service had proposed that the State Water Project and  
4 the Central Valley Project return to operations more like  
5 pre-2000 operations; correct?

6 A. Correct.

7 Q. This proposal is not part of your action matrix; correct?

8 A. Correct.

9 Q. And "operations more like pre-2000 operations" does not  
10 mean operations like pre-2000 operations; correct?

11 A. I don't understand the question.

12 THE COURT: Sustained. The witness' objection.

13 BY MR. WALL:

14 Q. Ms. Goude, the words "more like" do not mean the same as  
15 the word "like"; correct?

16 A. Yeah.

17 Q. Why has the Fish & Wildlife Service proposed that the  
18 State Water Project and the Central Valley Project return to  
19 operations more like pre-2000 operations?

20 A. It -- there was some information on pumping rates and,  
21 from the State Water Project, that appeared that pumping had  
22 increased in certain periods of time. And this was  
23 kind -- before the pelagic organism decline or before delta  
24 smelt decline. So it was thought as a mechanism to deal with  
25 some of those issues.

1 Q. And modifying State Water Project and Central Valley  
2 Project operations to be more like pre-2000 operations as  
3 recommended by the Fish & Wildlife Service would generally  
4 require a reduction in export pumping; correct?

5 A. Yes.

6 Q. But this specific recommendation from the Fish & Wildlife  
7 Service has not been included in your proposal in this case;  
8 correct?

9 A. No.

10 Q. Ms. Goude, is it your opinion that it is important to take  
11 preemptive action to protect delta smelt before they reach  
12 the -- or may be drawn into the entrained -- the salvage or  
13 export facilities?

14 A. Yes.

15 Q. And it would be important to take preemptive action  
16 quickly; correct?

17 A. Early. Yes, in time, yes.

18 Q. Because once delta smelt are detected in the vicinity of  
19 the export facilities, they may be entrained quite soon;  
20 correct?

21 A. Yes.

22 Q. Ms. Goude, a number of your actions, proposed actions  
23 would involve discussions with the Delta Smelt Working Group  
24 to determine what particular flow regime to implement;  
25 correct?

1 A. Action one and two really don't. Action three and I think  
2 four do.

3 Q. How often does the Delta Smelt Working Group meet?

4 A. They can meet up to weekly when there's issues that are  
5 going on. But for a while it seemed daily. It's really at  
6 the beck and call of the Fish & Wildlife Service. I shouldn't  
7 say "beck and call," at the request.

8 Q. And once the Delta Smelt Working Group is convened, it  
9 might make a recommendation to the Fish & Wildlife Service;  
10 correct?

11 A. Correct.

12 Q. And that might take a day or two for the Fish & Wildlife  
13 Service to process; correct?

14 A. We don't have a very big organization. It can be  
15 immediate.

16 Q. Ms. Goude, in the past, there have been occasions where  
17 the Delta Smelt Working Group has recommended actions to  
18 protect delta smelt where there's been no decision to  
19 implement those actions for as much as a week; correct?

20 A. That has happened.

21 Q. There's nothing in your proposed action matrix which would  
22 require prompter decisions than that; correct?

23 A. No. But I've been told to make sure it happens quickly  
24 from now on.

25 Q. In the past, have decisions about how to modify project

1 operations to protect the delta smelt taken longer than you  
2 would have liked?

3 A. Yes.

4 Q. And longer than you -- did they take longer to -- did  
5 those decisions take longer to be made than you asked? In  
6 other words, did you ask that the decisions be made more  
7 quickly than they were actually made?

8 A. And documented, yes.

9 Q. Ms. Goude, are you familiar with Dr. Hanson's proposed  
10 actions to protect delta smelt?

11 A. I looked at them, but I'm not as versed in them as obvious  
12 as mine, but we looked at them.

13 Q. Are you aware of any evidence that a net westerly flow on  
14 the San Joaquin River would provide demonstrated benefits with  
15 respect to delta smelt entrainment?

16 A. No.

17 Q. Does Water Rights Decision D 1641 require the Delta  
18 cross-channel gates to be closed from February 1 through May  
19 20th?

20 A. Yes.

21 Q. Does Dr. Hanson's proposed protective measures, said  
22 protective measures provide for those cross-channel gates to  
23 be open between February 1 and May 20th?

24 A. If I remember right, they do. Or it leaves it vague in  
25 the discussion.

1 Q. And Ms. Goude, is the justification for the requirement  
2 that those gates be closed from February 1 through May 20th  
3 based on years of study by the Fish & Wildlife Service and  
4 others showing that survival of juvenile salmonids through the  
5 Delta is reduced when those gates are open during the winter  
6 and spring?

7 A. Correct.

8 Q. Ms. Goude, does Dr. Hanson's proposed set of measures  
9 provide less protection for delta smelt than the Fish &  
10 Wildlife Service's action matrix?

11 A. In my opinion, yes.

12 Q. Ms. Goude, is the take limit that is set out in the  
13 invalidated 2005 Biological Opinion indexed to the Delta  
14 smelt's population in any way?

15 A. No.

16 Q. So if the Delta smelt's population were to plummet, the  
17 take limit for any given water year type would remain the  
18 same; correct?

19 A. It's -- it's done by median, so you -- as it plummets or  
20 it changes, you include it. But yes, that would modify it.  
21 If you used the same calculation.

22 Q. I'm sorry. The take limit is set at a fixed level for  
23 each water year type; correct?

24 A. Right. But we used a period of time to come up with a  
25 median. So it depends on what period of time we end up using

1 in any future consultation or how you do it.

2 Q. Let me focus your attention on the 2005 Biological Opinion  
3 that was the subject of the summary judgment motions in this  
4 case. That -- the take limits set in that Biological Opinion  
5 were fixed according to water year type; correct?

6 A. Correct.

7 Q. And if those take limits were maintained, then if delta  
8 smelt population were to plummet, the take limits would allow  
9 a higher level of take relative to the total delta smelt  
10 population; correct?

11 A. I don't know what the total delta smelt population is. I  
12 don't understand your question.

13 Q. I'm asking you to assume that the take limits in the  
14 Biological Opinion issued in 2005 and subject to this case  
15 were to be maintained?

16 A. Correct.

17 Q. And I'm asking you to assume that after that Biological  
18 Opinion was issued, the delta smelt population is reduced, it  
19 falls: In that case, the take limits would allow take of a  
20 higher proportion of the Delta smelt's population; correct?

21 A. Remember it's a median, so yes, that's true based on the  
22 numbers we used for the years. You could expand the years and  
23 re-do the calculation.

24 Q. But if the existing take limits or the 2005 Biological  
25 Opinion take limits were left in place, there wouldn't be a

1 re-calculation each year; correct?

2 A. No. If you didn't do the recalculation. Just remember,  
3 the 1995 had way higher take limits.

4 Q. Correct. And both of those were based on historic  
5 salvage; correct?

6 A. Right. But the -- if I remember right, the '95 was the  
7 total where we did a median for the '05.

8 THE COURT: How would you do a median for '05 if it's  
9 a '95 take?

10 THE WITNESS: No, no. I'm saying that the -- I'm  
11 sorry. The original -- the 1995 opinion that the 2005 opinion  
12 replaced used, if I remember right, a total, like they just  
13 averaged all of it.

14 What this one did was looked just -- it was a lower  
15 take level instead of going to the maximum amount of salvage,  
16 we went to a median. So that it would never be what you could  
17 have as a maximum on historic, it was halfway in between. So  
18 it resulted in lower numbers for the '05 because we thought  
19 that the take numbers were too high in the 1995 B0.

20 BY MR. WALL:

21 Q. Ms. Goude, in a below normal water year, the hydrology is  
22 below normal, the projects release water both for exports and  
23 for -- to meet water quality standards; correct?

24 A. Correct.

25 Q. So if exports were lowered, releases from the

1 facility -- the reservoirs for the State Water Project and  
2 Central Valley Project would also be lower; correct?

3 A. Yes.

4 Q. And more water would be left --

5 THE COURT: I'm sorry. How does that follow? If  
6 exports are lower, that means less net water is going out of  
7 the system. Why does that lower the reservoir?

8 MR. WALL: I may have misstated the question.

9 THE WITNESS: Yeah.

10 THE COURT: You did.

11 MR. WALL: Thank you, Your Honor.

12 Q. If exports are lowered, then the reservoir storage level  
13 would expect -- would be higher; correct?

14 A. To a certain point. At a certain point, reservoir levels  
15 then start to change. There's a certain point when you run  
16 out of water, you know, you reduce export you still have to  
17 deliver water for water quality standards or health and safety  
18 issues, or water -- and at a certain point, there is an effect  
19 on storage. I don't know what that point is.

20 MR. WALL: Give me one moment.

21 THE COURT: Yes, I will.

22 MR. WALL: Thank you, Ms. Goude. We're all done with  
23 our cross-examination.

24 THE COURT: Mr. Lee, do you wish to cross-examine?

25 MR. LEE: Very briefly, Your Honor.

## 1 CROSS-EXAMINATION

2 BY MR. LEE:

3 Q. Ms. Goude, could you please look at Plaintiffs' Exhibit  
4 Number 4, which I believe is the declaration of Christina  
5 Swanson, and refer to the attachment in the back. Attachment,  
6 I believe it's -- I don't believe it's actually designated.  
7 It's called the appendix. It would be the plaintiffs' revised  
8 recommended interim protection actions for delta smelt. And  
9 if you could look at action number seven, please.

10 A. Okay. I've got it.

11 Q. Could you read the words under column end of action,  
12 please.

13 A. "June 15 or a minimum of five days after the last  
14 detection of larval or juvenile delta smelt at either the  
15 State Water Project or Central Valley Project fish protective  
16 facilities by either the salvage or larval monitoring program,  
17 whichever comes last."

18 Q. If you could now look at the DWR Exhibit F. It is labeled  
19 "Exhibit D" on the top and it is entitled "Analysis of Last  
20 Date of Delta Smelt Salvage by Banks PP and Jones PP." It is  
21 a one-page document.

22 A. So I have one -- I don't have a sticky -- sticker on it.

23 So it's this Exhibit D? Okay.

24 Q. It would be entitled -- does it have Exhibit D on the top?

25 A. Yes.

1 Q. And is the title of it "Analysis of Last Date of Delta  
2 Smelt Salvage by Banks PP and Jones PP"?

3 A. Yes.

4 Q. All right. Could you please look down to the first  
5 column, the column that is entitled years. And go to year  
6 1996. Are you there?

7 A. Yes, I am.

8 Q. What type of water year type was 1996?

9 A. It was a wet year.

10 Q. All right. If you could now look at the last column  
11 entitled "Banks PP and Jones PP" under the general date of  
12 "last salvage date - all year types." What was the last date  
13 of salvage in 1996?

14 A. July 18th.

15 Q. Okay. Now, if you could look at the year 1997. What  
16 water year type was that?

17 A. It was wet again.

18 Q. And what was the last salvage date at Banks and Jones for  
19 1997?

20 A. July 20 -- July 23rd.

21 Q. And if you could look at 1998. What type of water year  
22 type was that?

23 A. It was wet.

24 Q. And what was the last salvage date?

25 A. July 10th.

1 Q. And if you could look then at 1999. What was the water  
2 year type?

3 A. Wet.

4 Q. And what was the last date of salvage?

5 A. July 26th.

6 Q. All right. How many wet years are identified in this  
7 analysis?

8 A. Five. Well, there's actually -- through the whole period  
9 of time, there's six, it looks like.

10 Q. All right. So would it be your testimony that four out of  
11 six of these years were wet?

12 A. Yes.

13 Q. And would it be your testimony that four out of those six  
14 years salvage, last date of salvage occurred later than June  
15 15th?

16 A. Yes.

17 Q. Thank you. Moving on to VAMP and its discussion. Do you  
18 have any reason to believe that during the April/May VAMP  
19 period, flows in Old and Middle River have been maintained at  
20 1500 cubic feet per second for a five-day running average?

21 A. I have no information.

22 MR. LEE: Your Honor, I have no further questions.

23 THE COURT: Thank you. Mr. Wilkinson.

24 MR. WILKINSON: Yes, Your Honor. I do have a few.

25 ///

1 CROSS-EXAMINATION

2 BY MR. WILKINSON:

3 Q. Good morning, Ms. Goude.

4 A. Good morning.

5 Q. I'm Greg Wilkinson, I represent the State Water  
6 Contractors. I believe you indicated yesterday in your  
7 testimony that the Fish & Wildlife Service is undertaking a  
8 development of an abundance estimate for delta smelt?

9 A. It's just begun as it related to a population estimate.

10 Q. That's not an estimate of trends; is it? It's an estimate  
11 of the absolute population?

12 A. It's an attempt to look at that, yes.

13 Q. Is that being undertaken by Dr. Ken Newman of the Fish &  
14 Wildlife Service's Stockton office?

15 A. Correct.

16 Q. Did Dr. Newman decide this should be done or did that  
17 direction come from someone else?

18 A. I'm not really sure where the direction. It may have  
19 come -- I thought it was part of the Pelagic Organism Decline  
20 request of studies, but I'm not sure.

21 Q. There is something called the Pelagic Organism Decline  
22 Action Team; is there?

23 A. Correct.

24 Q. And is it your understanding that that's where the request  
25 for a population abundance estimate came from?

1 A. Yes.

2 Q. Have you talked with Dr. Newman about the work that he's  
3 doing?

4 A. I have looked at some of the information and talked to one  
5 of his supervisors.

6 Q. Do you know if he is using any assumptions in his work?

7 A. He's attempting to, but it's -- he's going to have to  
8 because he's using the survey information.

9 Q. In other words, if you want to do a population abundance  
10 estimate, you would rely on survey data; is that right?

11 A. Correct.

12 Q. And what surveys would those be?

13 A. Well, it appears he's looking at the Fall Midwater Trawl,  
14 but I didn't really look at it very -- in detail because he  
15 has just an outline.

16 Q. Do you know if he's also looking at the Summer Townt  
17 Survey data or the 20 millimeter survey data?

18 A. He was going to look at both of those and compare that  
19 back into the Fall Midwater Trawl is my basic understanding of  
20 it.

21 Q. And then there are certain assumptions he would apply to  
22 those data; is that your understanding?

23 A. That is my understanding.

24 Q. Do you know if the assumptions that Dr. Newman is going to  
25 apply are the same assumptions that were developed by Dr.

1 Bennett in his 2005 paper?

2 A. No, I don't know that.

3 Q. You don't know whether they are or whether they are not;  
4 is that correct?

5 A. Correct.

6 Q. You don't know what the assumptions are?

7 A. No, I have not looked at that.

8 Q. Do you share the view of Dr. Bennett expressed in his 2005  
9 paper that developing an abundance estimate will be crucial  
10 for improving our understanding of the population status of  
11 the smelt?

12 A. I think it would be helpful, but I don't think it's  
13 crucial.

14 Q. You think it would be helpful?

15 A. I think it would be helpful.

16 Q. Why would that be?

17 A. It provides some information. But you still would need to  
18 look at the trend analysis and look at it over time because  
19 all it is is a snapshot in time. But you really need to look  
20 at what's happened in the past. So somehow it's going to have  
21 to be related to it.

22 Q. But that snapshot view of current abundance would be  
23 helpful?

24 A. Correct.

25 Q. Ms. Goude, do you believe that providing a net westerly

1 positive flow beginning December 1 could be helpful to the  
2 delta smelt?

3 A. Yes.

4 Q. But you haven't studied that in detail, though; is that  
5 right?

6 A. Not in detail.

7 Q. And is it your understanding that Dr. Hanson's tier one  
8 measure would commence on December 1st?

9 A. Yes.

10 Q. And the earliest measure that you have in your action  
11 matrix would commence on December 25th; is that right?

12 A. Right. Or based on temperature.

13 Q. But you don't believe that it's necessary to commence  
14 protective measures prior to the end of December or  
15 thereabouts; is that right?

16 A. Right.

17 Q. I think you indicated that you had briefly examined the  
18 measures in Dr. Hanson's declaration; is that correct?

19 A. Correct.

20 Q. Do you believe it might be worthwhile to spend more time  
21 discussing those measures prior to the onset of your action  
22 matrix?

23 A. I think that there has been -- nobody has ever proposed  
24 anything similar to what Dr. Hanson has provided. And just as  
25 the fall action, I think it would be worthwhile to look at

1 that information in the context of the OCAP consultation and  
2 the BA analysis that we're currently undertaking.

3 Q. Is the fact that nobody has proposed a measure like  
4 maintaining a positive net westerly flow the reason why  
5 there's no data on that?

6 A. I think there's some concerns whether his proposal would  
7 need to be modeled and looked at, the hydrology, to see that  
8 if you could really have the benefit of it and also could you  
9 actually do it. And also, because of the problems with salmon  
10 and the -- closing the cross Delta canal, whether that would  
11 be a problem. So I think it's something that's -- there's  
12 other issues that are worthy of exploration that will be done  
13 in the BA and the B0 that's coming.

14 Q. Are you saying that, in other words, there needs to be  
15 additional studies of Dr. Hanson's proposed measures before  
16 they would be implemented?

17 MR. WALL: Objection. That -- it's, I believe,  
18 argumentative or misstates the testimony.

19 THE COURT: It appears to be an attempt to summarize  
20 testimony. It's cross-examination. The objection is  
21 overruled. Do you understand the question?

22 THE WITNESS: Yes. Whether it would be implemented  
23 or not is not what I'm saying. What I'm saying is it, as well  
24 as other items and information, should be analyzed as part of  
25 the ongoing consultation that we're currently undertaking with

1 the Bureau of Reclamation and the DWR.

2 MR. WILKINSON: Do you have any idea --

3 THE COURT: What would be the --

4 MR. WILKINSON: I'm sorry.

5 THE COURT: -- net benefit of maintaining westerly  
6 flows as is proposed? Starting December.

7 THE WITNESS: I guess what we would want -- he has a  
8 Q west, if I have it right on the San Joaquin, where there  
9 used to be a Q west flow in the previous biological opinions  
10 was on the 1993 opinion and the '95 opinion, which was a Q  
11 west on the Sacramento River. That needs to be looked at as  
12 well as other issues. So no one's really, if I have it  
13 correct, has a Q west on the San Joaquin. So I'm just saying  
14 that we need to run the models and the hydrology and do the  
15 complete analysis.

16 BY MR. WILKINSON:

17 Q. Do you believe, Ms. Goude --

18 THE COURT: So let me just ask one more question. So  
19 at this point, it's speculation?

20 THE WITNESS: Correct.

21 BY MR. WILKINSON:

22 Q. Ms. Goude, do you believe there is time before December  
23 25th to undertake the studies that you describe?

24 A. No.

25 Q. In developing the Fish & Wildlife Service action matrix,

1 Ms. Goude, did you base your proposed actions exclusively on  
2 biological factors?

3 A. The Fish & Wildlife Service did, yes.

4 Q. Did you reject the inclusion of any action in your matrix  
5 because it would have a large water supply impact?

6 A. I really didn't care. I need to be clear on that. I  
7 really was looking at the biology and I was worried about  
8 salmon and steelhead. Others might have an issue with water  
9 cost, but that wasn't myself or the Fish & Wildlife Service.

10 Q. Yesterday you were asked about what causes reverse flows  
11 in Old and Middle River and I believe your answer was that it  
12 would be the operation of projects and tidal actions; is that  
13 correct?

14 A. That's my understanding.

15 Q. Do you know whether the Contra Costa Water District  
16 diverts from Old River?

17 A. I forgot. Yes.

18 Q. Do you know what the diversion rate of that facility is?

19 A. No, I can't remember. I'm sorry.

20 Q. If you assumed that the diversion rate was 250 cfs, would  
21 that have an impact on reverse flows in Old and Middle River?

22 A. It could, yes.

23 Q. Are there also agricultural diversions that are made from  
24 Old River?

25 A. Yes.

1 Q. Do you have any idea what the diversion rate in  
2 combination would be of those agricultural diversions?

3 A. No. But there are quite a few.

4 Q. Are there also agricultural diversions on Middle River?

5 A. Yes.

6 Q. If those agricultural diversions are, in fact, diverting,  
7 would they have an impact upon Old and Middle River flows?

8 A. They could.

9 Q. Is it true, Dr. Goude, that even if the projects were --

10 A. I'm just --

11 Q. Sorry.

12 A. I'm just a Ms.

13 Q. Ms. After all these days talking to PhD's, one gets  
14 confused.

15 Ms. Goude, is it the case that even if the state  
16 project and Central Valley Project were completely shut off  
17 and the diversions by the Contra Costa Water District and  
18 those agricultural diversions that we've described are  
19 ongoing, that there would be reverse flows in Old and Middle  
20 River?

21 MR. WALL: Objection. Incomplete hypothetical.

22 THE COURT: Does the question have enough information  
23 for you to answer it?

24 THE WITNESS: Yes.

25 THE COURT: Overruled. You may answer.

1 THE WITNESS: In certain year types and certain  
2 times, it could have, that could be an effect.

3 BY MR. WILKINSON:

4 Q. Under your action number three in your matrix, you target  
5 daily net upstream Old and Middle River flows in a range of  
6 zero to 4,000 cfs; correct?

7 A. Correct.

8 Q. If you target a zero flow under your action three and the  
9 Contra Costa Water District is diverting at a time when its  
10 diversion could cause reverse flows in Old and Middle River,  
11 how would you expect the projects to maintain a zero flow?

12 A. We did deal with a 14-day running average. So it would  
13 allow the fluctuation to be around that period of time. And  
14 then the seven-day running average would be never over 500 cfs  
15 because we had a concern that you could have a high peak and  
16 then down. So we were trying to keep it at a certain stable  
17 level.

18 Q. The Contra Costa Water District diversion is for municipal  
19 purposes; correct?

20 A. Correct.

21 Q. It's a continuous diversion; is that right?

22 A. I don't know if it's continuous, but it -- I -- they can  
23 use other -- they can use other places too.

24 Q. Under action three of your matrix, would you ever expect  
25 the projects to release water from storage in order to

1 counteract the diversions by others along Old and Middle  
2 River?

3 A. They may have to.

4 Q. I have a couple of questions regarding your -- also  
5 regarding action number three and the plaintiffs' action  
6 number five.

7 The trigger for your action number three, as I  
8 understand it, is the onset of spawning or when water  
9 temperatures reach 12 degrees; is that right?

10 A. Correct.

11 Q. And the trigger for the plaintiffs' action number five is  
12 also the onset of spawning or a 12 degree temperature.

13 A. Correct.

14 Q. I'd like you to assume, Ms. Goude, that we have a normal  
15 water year, that surveys show the smelt had spawned in the  
16 Sacramento River near Cache Slough and the larvae had been  
17 carried into Suisun Bay. And also that the 20 millimeter  
18 survey has not detected larval or early juvenile smelt in Old  
19 and Middle River. Do you have those assumptions in mind?

20 A. Uh-huh.

21 Q. Under those circumstances, what would the likely flow be  
22 under your range of flows?

23 A. Under ours would be probably a minus 4,000.

24 Q. Under the plaintiffs' proposed action five in those  
25 circumstances, what would be applicable flow?

1 A. I -- between minus 750 and minus 2250.

2 Q. In fact, they target a flow of negative 1500; isn't that  
3 correct?

4 A. Correct. I'm sorry.

5 Q. In your opinion, Ms. Goude, is there any biological  
6 benefit in those circumstances to maintaining a flow of  
7 negative 1500 cfs instead of a flow of negative 4,000 cfs?

8 A. Under those circumstances, no.

9 Q. The net water savings if your action number three was  
10 applied instead of plaintiffs' action number five would be  
11 what? In terms of the rate of flow.

12 A. I am sorry. I --

13 Q. Would it be the difference between negative 4,000 and  
14 negative 1500?

15 A. Oh. Yes.

16 Q. And that's about 2500 cfs?

17 A. Correct.

18 Q. What is that on a volumetric basis per day?

19 A. I don't know.

20 Q. Is it one cfs equal two acre feet a day?

21 A. That's the part where I pull over my little table. I  
22 don't know.

23 Q. I'd like you to assume that one cubic foot per second  
24 equals approximately two acre feet per day.

25 A. That is true. I do know that.

1 Q. All right. And if we have a difference in water rate of  
2 2500 cfs, what is that in acre feet per day?

3 A. I don't do math, period. I just --

4 Q. Wouldn't it be 5,000 acre feet, Ms. Goude?

5 MR. WALL: Objection, Your Honor, this is going  
6 beyond the scope of the witness' expertise.

7 THE COURT: Multiplication?

8 MR. WALL: Your Honor, the witness has testified --

9 THE WITNESS: Yes, it is.

10 THE COURT: That is both evasion and avoidance.

11 MR. WILKINSON: Ms. Goude, would --

12 THE COURT: Do the math.

13 BY MR. WILKINSON:

14 Q. Do you believe there is a substantial difference in the  
15 water supply effect if we were to maintain a flow of 1500 cfs  
16 instead of a flow of negative 4,000 cfs in these  
17 circumstances?

18 MR. WALL: Objection. Vague.

19 THE COURT: Do you understand the question?

20 THE WITNESS: Yes.

21 THE COURT: You may answer. Overruled.

22 THE WITNESS: It appears, based on those  
23 calculations, that there would be a savings of water cost.

24 BY MR. WILKINSON:

25 Q. Am I correct, Ms. Goude, that the action matrix that was

1 part of your declaration, was not put into final form until  
2 after you had returned from your vacation?

3 A. Yes.

4 Q. And in the final analysis, is it fair to say that you've  
5 considered only biological factors in developing the  
6 provisions of your matrix?

7 A. Yes.

8 Q. And it was the Fish & Wildlife Service that made the final  
9 decision about the measures that were to be included in the  
10 matrix?

11 A. Yes.

12 Q. Do you believe, Ms. Goude, that the operation of the state  
13 and federal projects in accordance with the measures that are  
14 set forth in your matrix will result in the extinction of the  
15 delta smelt in the next year?

16 A. No, I don't.

17 Q. Why is that?

18 A. I think that it's a one-year -- I think that they're  
19 protective. I think that even on action four, because of the  
20 level, I think that the service has taken a more vigorous role  
21 and I've been told to take a more vigorous role and pay  
22 attention and make sure that the actions are dealt with  
23 throughout this next year and also to get the Biological  
24 Opinion completed.

25 Q. You mentioned in your testimony that State Water Project

1 exports have increased. Do you recall?

2 A. Yes.

3 Q. Over what period of time were you referring to?

4 A. I would have to look at the graphics, but it seems to be  
5 from around -- around 2000, 2001 approximately.

6 Q. Do you have any idea of what the population growth has  
7 been in the state project service area for that period of  
8 time?

9 A. No.

10 MR. WILKINSON: That's all I have.

11 THE COURT: All right. We're going to take the  
12 morning recess. Give me a time estimate.

13 MR. BIRMINGHAM: 30 minutes, Your Honor.

14 THE COURT: What's the redirect, Mr. Maysonett?

15 MR. MAYSONETT: Ten minutes.

16 THE COURT: Mr. Wall?

17 MR. WALL: I neglected to move into evidence  
18 Plaintiffs' 14. And if I could do that now, I'd appreciate  
19 it.

20 THE COURT: Any objection?

21 MR. MAYSONETT: No, Your Honor.

22 MR. BIRMINGHAM: No, Your Honor.

23 THE COURT: Exhibit 14 is received in evidence.

24 (Plaintiffs' Exhibit 14 was received.)

25 THE COURT: Let's stand in recess until 15 minutes

1 after 11.

2 (Recess.)

3 THE COURT: Please be seated. We're back on the  
4 record in NRDC versus Kempthorne. Mr. Bi rmi ngham. You may  
5 exami ne.

6 MR. BI RMI NGHAM: Thank you very much, Your Honor.

7 CROSS-EXAMI NATION

8 BY MR. BI RMI NGHAM:

9 Q. Ms. Goude, my name is Tom Bi rmi ngham. I'm the attorney  
10 thi s morni ng for San Lui s & Del ta-Mendota Water Authori ty and  
11 Westl ands Water Di stri ct.

12 In your direct testimony yesterday, you bri efl y  
13 descri bed the process that is used to prepare a Bi ologi cal  
14 Opini on. I'd l i ke to focus a l i ttle bi t, i f we can, on the  
15 process that was used to prepare the 2005 Bi ologi cal Opini on  
16 whi ch is the subject of thi s l i tigation.

17 Was that Bi ologi cal Opini on based upon a bi ologi cal  
18 assessment?

19 A. Yes, i t was.

20 Q. And the bi ologi cal assessment contained a project  
21 descri ption; i s that correct?

22 A. That i s correct.

23 Q. Now, bri efl y, what i s a project descri ption?

24 A. Project descri ption descri bes the action that's proposed  
25 by the federal agency as well as any appli cants.

1 Q. And in this case, the project description was a  
2 description of how the Bureau of Reclamation and the  
3 Department of Water Resources proposed to operate the Central  
4 Valley Project and the State Water Project?

5 A. That's correct.

6 Q. The project description was based upon numerous  
7 operational criteria.

8 A. Correct.

9 Q. And did the project description contained in the  
10 biological assessment describe actions that the Central Valley  
11 Project and the State Water Project proposed to take to  
12 protect the delta smelt?

13 A. Yes.

14 MR. WALL: Your Honor, I'm going to object to this  
15 line of questioning. It's beyond the scope of the direct.

16 THE COURT: It may be in part, although it seems  
17 foundational to -- there have been a number of questions about  
18 the BiOp, about take limits, about water costs and the like.  
19 And so I'm not sure where it's going, I'm going to overrule  
20 the objection now, but you may renew it if we appear to be not  
21 on subjects that are going to be germane to our efforts here.  
22 You may continue.

23 MR. BIRMINGHAM: Let me see if I can get to that  
24 right now, Your Honor. Thank you.

25 Q. The 2000 -- the terms and conditions contained in the 2000

1 biological -- the 2005 Biological Opinion required that the  
2 Central Valley Project and the State Water Project implement  
3 actions, the protective actions described in the project  
4 description and measures, reasonable and prudent measures  
5 designed to protect the delta smelt; is that correct?

6 A. Yes.

7 Q. Now, the actions that you have proposed in Exhibit 2 to  
8 your declaration in evidence, Federal Defendants' Exhibit 3,  
9 those are actions that would be in addition to the protective  
10 actions contained in the 2005 Biological Opinion?

11 A. That's my understanding.

12 Q. Now, yesterday Mr. Maysonett asked you whether the Fish &  
13 Wildlife Service had reached a conclusion whether the current  
14 operations of the project are likely to jeopardize the  
15 continued existence of the delta smelt. Is it your  
16 understanding that when he said "current operations," he was  
17 describing the operations that were the premise of the 2005  
18 Biological Opinion?

19 A. No.

20 Q. What was your understanding of his term "current  
21 operations"?

22 A. The reinitiation that we're undergoing currently.

23 Q. Well, you said that -- you replied to his question that  
24 the service did make that -- make a determination in 2005, but  
25 that conclusion was not valid anymore. Do you recall that

1 testimony?

2 A. Yes.

3 Q. And your -- when you said that you made the conclusion in  
4 2005 that that conclusion was not valid anymore, you were  
5 talking about the 2005 -- the conclusion reached in the 2005  
6 Biological Opinion?

7 A. Yes.

8 Q. In your testimony yesterday, you didn't say what the  
9 conclusion reached in 2005 was. Was it the service's  
10 conclusion in 2005 that if the Central Valley Project and  
11 State Water Project were operated in a manner consistent with  
12 the project description contained in the biological  
13 assessment, that the operations of the Central Valley Project  
14 and the State Water Project would not jeopardize the continued  
15 existence of the delta smelt?

16 A. And that's correct.

17 Q. And so you issued a non-jeopardy opinion in 2005?

18 A. Yes.

19 Q. Now, in part, the conclusion that the -- that -- in part,  
20 the non-jeopardy opinion was based upon the actions contained  
21 in the biological assessment that were developed to protect  
22 the delta smelt from adverse effects of the CVP and SWP.

23 A. Yes.

24 Q. I'd like to go back to your testimony that the conclusion  
25 that you reached in 2005 is not valid anymore. Was your

1 statement that the conclusion was not valid anymore based upon  
2 a biological analysis?

3 A. No. Because the opinion has been considered not valid is  
4 my presumption.

5 Q. So your testimony that the -- that the conclusion you  
6 reached in 2005 that operations of the project, projects,  
7 excuse me, would not cause jeopardy to the species, was based  
8 upon a legal conclusion rather than a biological analysis?

9 A. Correct.

10 MR. BIRMINGHAM: Excuse me, Your Honor.

11 Q. Now, I would like to ask you some questions, Ms. Goude,  
12 concerning the preparation of the actions described in Exhibit  
13 2 to your declaration in evidence as Federal Defendants'  
14 Exhibit 3.

15 The actions were developed by an interagency team of  
16 biologists from the service, the National Marine Fisheries  
17 Service, the California Department of Fish & Game, the  
18 California Department of Water Resources and the Bureau of  
19 Reclamation.

20 A. And National Marine Fisheries Service.

21 Q. I'm sorry. I thought I said National Marine Fisheries  
22 Service.

23 A. You may. Yes.

24 Q. Prior to the development of these actions, did that  
25 interagency team of biologists conclude that the protective

1 actions contained in the 2005 Biological Opinion were  
2 insufficient to protect the delta smelt from likely extinction  
3 caused by the operations of the CVP and SWP?

4 A. They weren't discussing that.

5 Q. The actions were developed to submit to this Court in  
6 connection with the remedies phase of these proceedings; is  
7 that correct?

8 A. Yes, that's correct.

9 Q. And again, the actions described in Exhibit 2 to your  
10 declaration that is in evidence as Federal Defendants' Exhibit  
11 3 would be in addition to the protective actions described in  
12 the 2005 Biological Opinion.

13 A. That is my understanding.

14 Q. And the actions described in Exhibit 2 to your declaration  
15 that is in evidence as Federal Defendants' 3 are intended to  
16 minimize or avoid adverse effects of the CVP and SWP  
17 operations on the delta smelt.

18 A. Yes.

19 Q. They're intended to minimize or avoid take of the delta  
20 smelt at the CVP and SWP Delta pumping plants.

21 A. Yes.

22 Q. Now, Ms. Goude, in 2005, you reached a conclusion, the  
23 service reached a conclusion that the operations of the  
24 projects described in the biological assessment would not  
25 cause jeopardy to the continued existence of the delta smelt.

1 I would like to ask you for a Biological Opinion at  
2 this point. If the Central Valley Project and the State Water  
3 Project were operated in accordance with the project  
4 description contained in the biological assessment served as  
5 the basis for the 2005 Biological Opinion, is it likely that  
6 the operations of the Central Valley Project and State Water  
7 Project would cause the extinction of the delta smelt over the  
8 course of the next year?

9 A. Did you include the matrix? I'm sorry.

10 Q. No. I'm not including the matrix. And let me ask the  
11 question again.

12 THE COURT: It's without the matrix.

13 THE WITNESS: Without the matrix.

14 THE COURT: Just the '05 biological assessment and  
15 Biological Opinion.

16 BY MR. BIRMI NGHAM:

17 Q. And again, Ms. Goude, my question is if the CVP and SWP  
18 were operated in accordance with the project description which  
19 served as the basis of the 2005 biological assessment, is it  
20 likely that the operations of the CVP and SWP would cause the  
21 extinction of the delta smelt over the next year?

22 A. It's a difficult question, but because of the low numbers,  
23 in my opinion, it could.

24 Q. Ms. Goude, I'd like to talk to you about -- or ask some  
25 questions about threats to the continued existence of the

1 delta smelt. In your declaration that's in evidence as  
2 Federal Defendants' 3, on page 3, lines 25 to 27, you state,  
3 "This recovery plan will address numerous threats that are  
4 affecting delta smelt and their habitat as well as described  
5 recovery actions expected to benefit the species."

6 Do you see that?

7 A. Yes.

8 Q. In the next sentence -- well, first let me ask you a  
9 foundational question. The -- the recovery plan that's  
10 referred to in that sentence that I just read from your  
11 declaration in evidence as Federal Defendants' 3 is referring  
12 to the recovery plan that is currently being developed by the  
13 Fish & Wildlife Service?

14 A. The revised one, yes.

15 Q. And that's for the delta smelt?

16 A. Correct.

17 Q. Now, in the next sentence of your declaration in evidence  
18 as Federal Defendants' 3, you make reference to a number of  
19 threats to the delta smelt, including contaminants, invasive  
20 species, available spawning and rearing habitat and diversions  
21 of water, both consumptive use and cooling water for power  
22 plants. You see that?

23 A. Correct. Yes, I do.

24 Q. Is the sampling of delta smelt, in order to calculate an  
25 abundance index, a threat to the delta smelt?

1 A. We actually issued a recovery permit from the agency.

2 Q. Is there mortality associated with taking delta smelt in  
3 connection with the surveys conducted to prepare the  
4 population index?

5 A. Yes.

6 Q. And sometimes that mortality, the mortality that's  
7 associated with the delta smelt sampling can be as many as  
8 several hundred smelt; isn't that correct?

9 A. There has been times, yes.

10 Q. So when the Fish & Wildlife Service or the Department of  
11 Fish & Game or another agency, Department of Water Resources,  
12 goes out and conducts the sampling to prepare the population  
13 index, the sampling actually kills delta smelt.

14 A. Yes.

15 Q. And you issue a take authority associated with that  
16 mortality. The service issues a take authority.

17 A. Correct.

18 Q. Now, going back to the threats identified in your  
19 declaration that's in evidence as Federal Defendants' Exhibit  
20 3. Would you agree that we don't know the degree to which  
21 each of the threats identified have contributed to the decline  
22 of delta smelt abundance?

23 A. No.

24 Q. You would not agree with that?

25 A. Oh, yes, I would agree that you cannot distinguish at

1 times.

2 Q. So in other words, we don't know, standing here today,  
3 despite all of the data that has been collected over the years  
4 concerning delta smelt, we don't know whether it's project  
5 operations, in-Delta diversions, diversions of power plants,  
6 invasive species, contaminants that are causing the decline of  
7 the delta smelt?

8 A. No. We don't. We are consulting on the action before us.

9 Q. Now, let me take a moment and ask you, Ms. Goude, what has  
10 Fish & Wildlife Service done to prevent the take of delta  
11 smelt at the pumping plants referred to in your declaration?

12 A. Well, there has been times where we have asked for  
13 curtailment of pumping.

14 Q. You asked for curtailments. And have the pumping plants  
15 complied with those requests?

16 A. Yes.

17 Q. Have there been times when they haven't complied with  
18 those requests?

19 A. How far back do you --

20 Q. Well, since the delta smelt has been listed in 1993.

21 A. I wasn't actively involved. There was a period of time  
22 that I wasn't participating in the WOMT and evidently there  
23 was some times.

24 Q. Now, do those power plants have a -- any authorization  
25 from the Fish & Wildlife Service to take delta smelt in

1 connection with their operations?

2 A. We have been in discussion with them that they need to  
3 either do Section 7 or a HCP.

4 Q. Would it be Section 7 or Section 10?

5 A. Well, it would be Section 10 if they have no federal  
6 nexus, I'm sure they're looking for a federal nexus.

7 Q. And, in fact, the pumping plants are involved in a process  
8 right now to develop a Habitat Conservation Plan for the Delta  
9 that would provide protection for the delta smelt; is that  
10 correct?

11 A. I've heard that, yes.

12 Q. Now, what has the Fish & Wildlife Service done to limit  
13 the effect of invasive species on the abundance of delta  
14 smelt?

15 MR. WALL: Objection. It assumes a fact not in  
16 evidence from this witness' testimony.

17 THE COURT: You may lay the foundation. Sustained.  
18 Have they done anything?

19 THE WITNESS: We have been obviously doing studies,  
20 looking at information, participating in ongoing research.

21 BY MR. BIRMINGHAM:

22 Q. So there's been no direct action taken to limit the effect  
23 of invasive species on the abundance of delta smelt?

24 A. The service doesn't have omnipotent powers to do anything.  
25 Basically it's only when there's an action before the agency

1 that we can, in fact, act.

2 Q. Now, Ms. Goude, in your declaration, in your August 3  
3 declaration in evidence as DWR Exhibit D, you cite to a  
4 preliminary analysis by Manly and Chotkowski. Is that  
5 correct?

6 A. Correct.

7 Q. The Manly you refer to is Brian Manly, Ph.D.?

8 A. Correct.

9 Q. And Dr. Manly is a highly regarded biologist and  
10 statistician.

11 A. I knew he was a statistician, I really wasn't aware of the  
12 other. Yes.

13 Q. But he is a highly regarded statistician?

14 A. Yes.

15 Q. Now, in their preliminary analysis, Manly and Chotkowski  
16 found that project operations -- and here we're talking about  
17 operations of the CVP and SWP -- have a statistically  
18 significant effect on the abundance of delta smelt; is that  
19 correct?

20 A. Correct.

21 Q. But they found that that effect was small.

22 A. Yes.

23 Q. In fact, Manly and Chotkowski found that the variation in  
24 delta smelt abundance attributable to the operations of CVP  
25 and SWP were less than five percent.

1 A. I don't remember the number.

2 Q. Well, I'm going to ask you to assume that the CVP and SWP  
3 operations account for less than five percent of the variation  
4 in delta smelt abundance. If that were the case, wouldn't  
5 that lead you to conclude that the remaining limiting factors  
6 were causing a significant decline in the delta smelt?

7 MR. WALL: Objection as to form.

8 THE COURT: Do you understand the question?

9 THE WITNESS: Yes.

10 THE COURT: Overruled. You may answer.

11 THE WITNESS: Not necessarily. It really is  
12 dependent on many factors, so you really don't know if you can  
13 make that conclusion. It may be that there -- you won't be  
14 able to ever make a direct link on the percentage or which one  
15 is the most important. You have to do an inference of the  
16 factors, both direct and indirect.

17 BY MR. BIRMINGHAM:

18 Q. I would like to go to Table 1 to your declaration in  
19 evidence as DWR Exhibit 4. Do you have a copy of that in  
20 front of you?

21 A. Is this the same Exhibit D or something else?

22 Q. No.

23 A. I mean --

24 Q. I may be mistaken. Excuse me.

25 THE COURT: There is a Plaintiffs' Exhibit 4. That's

1 the Swanson declaration. This Exhibit is Federal Defendants'  
2 3. And so I'm not sure what, because there are no DWR  
3 exhibits that have numbers, they all have letters.

4 MR. BIRMINGHAM: Your Honor, maybe other counsel can  
5 help me. There was an examination concerning a table that  
6 showed the relationship between -- it's DWR D, which is the  
7 declaration of Cay Goude dated, I believe, August 3, 2007.

8 THE WITNESS: Oh. So it's my August 3rd declaration?

9 BY MR. BIRMINGHAM:

10 Q. Yes.

11 A. And you're looking at?

12 Q. Exhibit 1.

13 Now, this exhibit purports to show the relationship  
14 of net upstream Old and Middle River flow with salvage of  
15 adult delta smelt. Is that correct?

16 A. Let's see. When did I refer to the exhibit?

17 MR. BIRMINGHAM: May I approach the witness, Your  
18 Honor?

19 THE COURT: Yes, you may.

20 MR. BIRMINGHAM: Thank you.

21 THE WITNESS: I see it.

22 MR. BIRMINGHAM: It's this right here.

23 THE WITNESS: I'm looking at the wrong one. Sorry.  
24 I was on the wrong declaration.

25 BY MR. BIRMINGHAM:

1 Q. Just to make sure that our record is correct. We are now  
2 referring, Ms. Goude, to DWR Exhibit D, which is your August  
3 3, 2007 declaration.

4 A. Yes.

5 Q. And I'm looking at Table 1, which is -- I'm sorry, Exhibit  
6 1, which is a table or chart that purports to show the  
7 relationship of net upstream old and river -- excuse me, the  
8 relationship of net upstream Old and Middle River flow with  
9 salvage of adult delta smelt.

10 A. Correct.

11 Q. Now, in the upper left-hand corner of the graph that is  
12 Exhibit 1 to DWR Exhibit D, it shows that there is an  $R^2$  equal  
13 to 0.61. Is that correct?

14 A. Correct.

15 Q. Now, that indicates that 61 percent of the variation of  
16 salvaged fish to rate of combined Old and Middle River flow is  
17 explained by the relationship; is that correct?

18 A. Correct.

19 Q. Now, does this table necessarily mean that in a particular  
20 year, if you have a combined Old and Middle River flow of  
21 minus 4,000 cfs, you will have a salvage of approximately 5800  
22 acre fish at the SWP and CVP?

23 THE COURT: Did you intend to say "acre fish"?

24 MR. BIRMINGHAM: I'm sorry. I beg your pardon, Your  
25 Honor.

1 MR. WALL: That would be a lot of fish.

2 THE COURT: That's new data.

3 MR. ORR: We wish there were an acre fish.

4 MR. BIRMINGHAM: We don't know that there isn't.

5 Q. The -- let me ask the question again so we make sure the  
6 record is clear.

7 Does this graph purport to show that in any given  
8 year, if the combined Old and Middle River flow is minus 4,000  
9 cfs, that we will have fish salvage at this CVP and SWP of  
10 approximately 3800 fish?

11 A. It doesn't necessarily mean that will happen, it just  
12 means that's what -- the years they looked at in the  
13 relationship that they graphed.

14 Q. And I want to focus on that. What this chart shows is the  
15 variation from the data collected in these different year  
16 types.

17 A. Correct.

18 Q. And to obtain a repeat of this relationship, the  
19 relationship that's depicted in this table, the graph, you  
20 would have to have the same conditions that existed when those  
21 data were collected.

22 A. Possibly.

23 Q. The analysis that's depicted in this graph, Exhibit 1 to  
24 your declaration in evidence as DWR Exhibit 3, assumes static  
25 populations of delta smelt in each one of the sampling years.

1 A. I don't know if it's static, but it assumes -- it's just  
2 what it is. It was the amount of fish salvaged and the flow  
3 of those times and the relationship.

4 Q. Now, I'd like to focus on 1996 if we can, Ms. Goude. I  
5 believe in your earlier testimony, you said whether the  
6 salvage in 1996 was a significant number of fish would depend  
7 upon a lot of factors. Is that your opinion?

8 A. Yes.

9 Q. And among those factors is the abundance level of delta  
10 smelt in the previous Fall Midwater Trawl index.

11 A. Yes.

12 Q. Now, during the -- one of the recesses we took this  
13 morning, did you have an opportunity to review the data  
14 related to the -- excuse me, review the data that were used in  
15 the preparation of this analysis depicted in Exhibit 1 to DWR  
16 Exhibit D?

17 A. I just looked at the Fall Midwater Trawl for the '95.

18 Q. And the Fall Midwater Trawl for '95 was a -- well, let's  
19 just say what it was. It was 899; wasn't it?

20 A. Yes.

21 Q. And comparatively speaking, that's a relatively high  
22 number.

23 MR. WALL: Objection to form. Vague.

24 THE COURT: Do you understand the question?

25 THE WITNESS: Yes.

1 THE COURT: Overruled. You may answer.

2 THE WITNESS: I'd be happy to have that number again.

3 BY MR. BIRMI NGHAM:

4 Q. And when we calculate the ratio of salvage to the previous  
5 midwater -- Fall Midwater Trawl index, that is point -- I'm  
6 sorry, 6.3 percent; is that correct?

7 A. It sounds correct.

8 Q. And so again, speaking in relative terms, that data point  
9 from 1996 is relatively low compared to the ratio of salvage  
10 to previous Fall Midwater Trawl samples in other years.

11 A. In a relative sense, yes.

12 Q. And so despite the fact that we have this data point of  
13 approximately 5800 fish -- actually I'll tell you exactly what  
14 it is, 5634 fish in 1996, whether or not that is a high ratio  
15 is going to depend upon a variety of factors, including the  
16 number of fish under the previous Fall Midwater Trawl index.

17 A. That's correct.

18 Q. With respect to negative flows in Old and Middle River,  
19 you testified yesterday that negative flows appear to affect  
20 delta smelt. And when asked how, you responded by saying it's  
21 speculated and assumed that they basically increase the level  
22 of entrainment of delta smelt. Do you recall that testimony?

23 A. Yes.

24 Q. Now, my questions relates to your use of the words  
25 "speculated and assumed." When you said it's speculated and

1 assumed that negative flows appear to increase entrainment,  
2 did you mean that there's no scientific analysis that shows an  
3 established relationship between negative flows in Old and  
4 Middle River and levels of entrainment?

5 A. You do have this relationship that we've talked about.  
6 But there's a lot of discussion. And I guess maybe instead of  
7 the word "speculated," I could have used the word  
8 "hypothesized." But the point is that you have to use best  
9 professional judgment to come up with some answers.

10 Q. Well, now, when you're applying the Endangered Species  
11 Act, do you use best professional judgment or best scientific  
12 information available?

13 A. You use everything, both.

14 MR. BIRMINGHAM: May I have a moment, Your Honor?

15 THE COURT: Yes, you may.

16 MR. BIRMINGHAM: Thank you.

17 Q. I'd like to ask you some questions, Ms. Goude, about  
18 Plaintiffs' Exhibit 13 in evidence, which is, I believe, a  
19 transmittal letter of the five-year status review for the  
20 delta smelt as well as the status review itself.

21 Do you have Plaintiffs' Exhibit 13 in evidence in  
22 front of you?

23 A. I have it, I just have to find it. I've got it.

24 Q. Do you have it, Ms. Goude?

25 A. Oh, I'm sorry. Yes.

1 Q. Thank you. I'd like you to turn to page 28 of Plaintiffs'  
2 Exhibit 13 in evidence.

3 First, let me ask: Plaintiffs' Exhibit 13 in  
4 evidence is an explanation of the rationale of the Fish &  
5 Wildlife Service concerning why the delta smelt should remain  
6 on the list of threatened species. Is that correct?

7 A. That's correct.

8 Q. And so it's an explanation of each one of the factors that  
9 the Fish & Wildlife Service would consider. And among those  
10 factors is the lack of regulatory control over the proposed  
11 act -- over the proposed actions if the species is not listed.

12 A. That's correct.

13 Q. Now, looking at this paragraph on the top of page 28 that  
14 starts "The threats." It states, "The threats of destruction,  
15 modification or curtailment of its habitat or range resulting  
16 from extreme outflow conditions (reduced outflow or high  
17 outflow) and/or the operations of the state and federal water  
18 projects could result in the extinction of the delta smelt,"  
19 citing CDFG 2003g and Moyle 2002, 2003."

20 A. Yes.

21 Q. Now, what the Fish & Wildlife Service is saying in this  
22 paragraph is that if the CVP and SWP were unregulated because  
23 the delta smelt were removed from the list of threatened  
24 species, it -- their operations could cause the potential  
25 extinction of the species.

1 A. I'm not -- was this in the regulatory mechanism section?  
2 I'm sorry.

3 THE COURT: Well, if you know, you can answer the  
4 question. If you don't know, you can say you don't know.

5 THE WITNESS: I don't know.

6 BY MR. BIRMI NGHAM:

7 Q. Well --

8 A. That would be one of the assumptions if you didn't have  
9 regulatory mechanisms. But I'm not sure if it's in the right  
10 context.

11 Q. Well, let's go back. This document was prepared on March  
12 31, 2004.

13 A. Correct.

14 Q. And when I say "this document," I'm referring to  
15 Plaintiffs' Exhibit 13 in evidence. And subsequently, the  
16 Fish & Wildlife Service issued a non-jeopardy opinion for  
17 biological -- excuse me, a non-jeopardy opinion for delta  
18 smelt.

19 A. That's correct.

20 Q. And that non-jeopardy opinion concluded that if the State  
21 Water Project and Central Valley Project were operated  
22 according to the protective actions in the Biological Opinion  
23 and biological assessment, that they were not likely to cause  
24 the extinction of these species.

25 MR. WALL: Objection. Asked and answered.

1 THE COURT: Sustained.

2 MR. BIRMINGHAM: Your Honor, I would request that  
3 this document that I am handing to the clerk be marked as San  
4 Luis and Del ta-Mendota Water Authori ty Exhi bi t B.

5 (Defendants' Exhi bi t SL B was marked for  
6 i denti fi cati on. )

7 THE COURT: It wi ll be so marked.

8 MR. BIRMINGHAM: Ms. Goude -- may I approach, Your  
9 Honor?

10 THE COURT: You may.

11 BY MR. BIRMINGHAM:

12 Q. Ms. Goude, I'm handing you a document that's been marked  
13 for i denti fi cati on as San Lui s Exhi bi t B.

14 Have you seen thi s document before?

15 A. Yes.

16 Q. San Lui s Exhi bi t B for i denti fi cati on i s a memorandum to  
17 the admi ni strati ve record signed by Steve Thompson; i s that  
18 correct?

19 A. Yes.

20 Q. And I believe yesterday you testi fi ed that Mr. Thompson i s  
21 the area manager for the Cali forni a/Nevada offi ce of the Fi sh  
22 & Wi ldl i fe Servi ce?

23 A. Yes.

24 Q. And the subject of San Lui s Exhi bi t B for i denti fi cati on  
25 i s an expl anati on of contents of an electroni c email sent by

1 Deputy Assistant Secretary Julie McDonald to Steve Thompson;  
2 is that correct?

3 A. That's correct.

4 Q. And the document San Luis Exhibit B, contains a further  
5 explanation of what is in the five-year status review that's  
6 been introduced into evidence as Plaintiffs' Exhibit 13. Is  
7 that correct?

8 MR. WALL: Your Honor, I'm going to object. I  
9 believe the document before us is the best evidence of its  
10 contents.

11 THE COURT: The objection on best evidence grounds is  
12 sustained. You can ask a question about the document if you  
13 wish the witness to --

14 BY MR. BIRMINGHAM:

15 Q. Ms. Goude, do you know if San Luis Exhibit B was prepared  
16 by the Fish & Wildlife Service in connection with its efforts  
17 to regulate the -- or protect the delta smelt because of its  
18 status as a threatened species?

19 A. This memorandum?

20 Q. Yes.

21 A. I saw it after -- later.

22 THE COURT: Do you know the purpose the memorandum  
23 was prepared for? Without guessing.

24 THE WITNESS: No. I -- well, without guessing, no.

25 BY MR. BIRMINGHAM:

1 Q. Well, let me ask you to turn to page four of the document  
2 that's been marked as San Luis Exhibit B for identification.  
3 At the bottom of the page, there is a statement, it's the last  
4 sentence on the page states that the relative contribution of  
5 each of the various identified threats to delta smelt  
6 continues to be determined and our knowledge of this topic is  
7 continually refined as more information becomes available. Do  
8 you see that -- do you see that statement, Ms. Goude?

9 A. This is -- I'm sorry, under four?

10 Q. On page four --

11 THE COURT: The bottom -- the last paragraph on the  
12 page.

13 THE WITNESS: Yes. All right. Yes, I see it. I see  
14 it.

15 BY MR. BIRMINGHAM:

16 Q. And is that a statement that still reflects our knowledge  
17 as to the -- let me state it differently. Is that a statement  
18 that still reflects the knowledge of the Fish & Wildlife  
19 Service as to the relevant contribution of each of the  
20 variations discussed?

21 A. You would have to look at the current status in context of  
22 the five threat analysis now.

23 Q. Going on to page five, the first full paragraph states  
24 that the original listing document five year status review and  
25 subsequent status reviews of delta smelt all acknowledge to

1 varying degrees the threats to delta smelt are not fully  
2 understood. And that the relative importance of each threat  
3 is not fully understood.

4 Do you see that statement, Ms. Goude?

5 A. Yes.

6 Q. Is that a statement with which you agree as a biologist?

7 A. The broadly speaking?

8 Q. The -- yes.

9 A. Yes.

10 Q. No, I'm sorry. I'm sorry.

11 A. No.

12 Q. Let me rephrase the question. It states that the original  
13 listing document, the five-year status review and subsequent  
14 status reviews of delta smelt all acknowledge to varying  
15 degrees the threats to delta smelt are not fully understood  
16 and that the relative importance of each threat is not fully  
17 understood.

18 Do you see that statement on page five of San Luis  
19 Exhibit B for identification?

20 A. Yes.

21 Q. And the statement which I just read from San Luis Exhibit  
22 B for identification. Is that a statement that you -- with  
23 which you agree as a biologist?

24 A. Yes.

25 Q. And then the next sentence on page five of San Luis for

1 identification B states, "Broadly speaking the threats to  
2 delta smelt include water project operations introduced  
3 non-native species in the Delta, habitat loss and  
4 contaminants." Do you see that statement?

5 A. Correct. Yes.

6 Q. And does that reflect your opinion as a biologist?

7 A. That broadly speaking hits most of the issues, yes.

8 Q. Now, let me ask this question, Ms. Goude: I'm going to  
9 ask you to assume that we completely shut down the pumps at  
10 the Delta facilities and the State Water Project and the  
11 Central Valley Project. Isn't there a chance that  
12 notwithstanding shut down of the pumps, the delta smelt would  
13 still go extinct?

14 A. Yes.

15 MR. BIRMINGHAM: Thank you. I have no further  
16 questions, Your Honor.

17 THE COURT: Mr. Maysonett, redirect?

18 MR. MAYSONETT: Thank you, Your Honor.

19 REDI RECT EXAMI NATION

20 BY MR. MAYSONETT:

21 Q. Ms. Goude, I just have a few more questions for you on  
22 redirect.

23 I believe during your testimony, Ms. Goude, you  
24 stated that the projects do not currently sample for delta  
25 smelt smaller than 20 millimeters; is that correct?

1 A. Yes.

2 Q. In your opinion, is it possible to reach meaningful  
3 conclusions about whether delta smelt larvae are present at  
4 the pumps on the basis of existing scientific data?

5 A. Yes.

6 Q. How would you do that?

7 A. You would use the temperatures, you could use the various  
8 Kodiak trawls, various 10 millimeters and actual salvage.

9 THE COURT: Do you mean 20 millimeter? You said ten.

10 THE WITNESS: Did I say ten?

11 THE COURT: You said ten.

12 THE WITNESS: I'm sorry. 20.

13 BY MR. MAYSONETT:

14 Q. And in your opinion, is it necessary to conduct new  
15 monitoring at the pumps for delta smelt smaller than 20  
16 millimeters to reach meaningful conclusions about whether  
17 delta smelt larvae are present at the pumps?

18 A. No.

19 THE COURT: Would it be desirable to do it? By  
20 "desirable," I mean in the interest of the species.

21 THE WITNESS: I'm afraid it would confound the  
22 existing 20 millimeter sampling, or the actual salvage  
23 sampling that's going on. It might be something you could  
24 look at.

25 THE COURT: If all you're looking for is are there

1 smaller fish out there, and that's the purpose that I  
2 understand this additional sampling is proposed for, on this  
3 issue.

4 THE WITNESS: It would be just how much. If you just  
5 had to do spot survey, so it would be an issue of volume or  
6 how you would accomplish it. So if you did it in a minimal  
7 basis, it's less of a problem as if you did it in a very  
8 aggressive way. So it's all in the regime.

9 THE COURT: Well, let's relate it to the plaintiffs'  
10 proposal. If you sampled at the level the plaintiffs have  
11 suggested to try to detect these sub-20 millimeter fish or  
12 larvae, is this something that's in the interest of the  
13 species or not necessary?

14 THE WITNESS: I couldn't -- I couldn't tell the level  
15 of sampling effort.

16 THE COURT: From the proposal?

17 THE WITNESS: From the proposal.

18 THE COURT: All right. Thank you.

19 BY MR. MAYSONETT:

20 Q. Ms. Goude, yesterday I believe you testified that you  
21 could not confirm whether or not it was exactly four percent  
22 of delta smelt juveniles that survive to adulthood. Is  
23 it -- in your opinion, is it fair to say that only a small  
24 proportion of juvenile smelt survive to adulthood?

25 A. That's correct.

1 Q. Ms. Goude, are negative flows on the Old and Middle Rivers  
2 affected in part by releases from upstream reservoirs?

3 A. They can be.

4 Q. Ms. Goude, in your experience, in the event that  
5 there's --

6 THE COURT: Let's -- if you don't mind, let's add  
7 some meaning to that. Which way are they affected? Assume an  
8 increase in releases from upstream reservoirs, what's the  
9 effect on negative flows in the Delta?

10 THE WITNESS: Well, it depends on which reservoir.  
11 Are you talking on the old and -- that sometimes if you're  
12 looking at New Melones, that could be a contribution off the  
13 Stanislaus. And then you could have a small percentage on the  
14 Sacramento River side if they also curtailed pumping because  
15 there's only really two ways to control things is pumping or  
16 reservoir release is my understanding.

17 THE COURT: Thank you.

18 BY MR. MAYSONETT:

19 Q. Ms. Goude, in your experience, if there is a dispute  
20 between the Bureau of Reclamation and the Fish & Wildlife  
21 Service, is there a process within the federal government to  
22 resolve that dispute?

23 A. Yes, there is.

24 Q. And what process would that be?

25 A. It would be to be elevated to the Secretary of Interior.

1 Q. Ms. Goude, several times throughout your testimony, you  
2 refer to water costs. Could you briefly explain what you mean  
3 by the term "water costs"?

4 A. Well, there -- it's been in two contexts. I haven't  
5 looked at the evaluation of water costs as it relates to ag  
6 and M and I and that's a typical thought of water costs. When  
7 I think of water, I'm actually thinking of how you're managing  
8 the water for the various species that we're charged with over  
9 time. So when I'm thinking of water, I'm thinking of how are  
10 you going to make sure you have sufficient water for each  
11 action into the next year.

12 Q. And when you say "ag," you mean -- could you explain --

13 A. Agricultural contracts.

14 Q. And M and I?

15 A. Municipal and industrial.

16 Q. Okay. Ms. Goude, do you have any expectations about  
17 whether the coming water year will be a wet water year?

18 A. No.

19 Q. Are you aware of any forecasts on whether the coming water  
20 year will be a wet water year?

21 A. No, my understanding that the storage of the reservoirs is  
22 low at this point, so we're going in with low storage.

23 Q. Ms. Goude, I believe you testified that it was in your  
24 opinion that the suite of actions proposed by the plaintiffs  
25 would be somewhat more protective for the delta smelt than the

1 suite of actions proposed by the service.

2 In your opinion, would the measures proposed by the  
3 plaintiffs be -- provide significantly greater protection to  
4 the delta smelt than the actions proposed by the service?

5 A. Not significantly.

6 MR. MAYSONETT: Thank you. I have nothing further,  
7 Your Honor.

8 THE COURT: All right. Mr. Wall, what's your  
9 estimate on redirect?

10 MR. WALL: Recross?

11 THE COURT: Excuse me. Recross.

12 MR. WALL: Just a couple of questions.

13 THE COURT: All right. Proceed.

14 RECCROSS-EXAMINATION

15 BY MR. WALL:

16 Q. Ms. Goude, if a dispute between the Bureau of Reclamation  
17 and the Fish & Wildlife Service is elevated to the  
18 assistant -- or rather to the Secretary of the Interior,  
19 resolution of that dispute can sometimes take weeks; correct?

20 A. I don't know. I've actually never had to do that, so -- I  
21 would assume in this case it would have to be quick.

22 Q. The Secretary of the Interior's schedule can be quite  
23 full; isn't that correct?

24 A. They -- I don't know. Yes.

25 THE COURT: Well, if you don't know, how can you say

1 yes?

2 THE WITNESS: Well, okay. You're right. Sorry.

3 BY MR. WALL:

4 Q. Ms. Goude, could I ask you to look at San Luis and  
5 Delta-Mendota Water Authority Exhibit B.

6 A. The October 27th one -- okay. I've got it. Yes.

7 Q. And if you could look at page 4. And if you could look at  
8 the sentence near the bottom that begins "accurate." Could  
9 you read that for us?

10 A. "Accurate absolute population estimates for delta smelt do  
11 not exist."

12 Q. Do you agree with that statement?

13 A. Yes.

14 MR. WALL: Nothing further, Your Honor.

15 THE COURT: Mr. Lee, anything further?

16 MR. LEE: Nothing further.

17 THE COURT: Mr. Wilkinson, anything further?

18 MR. WILKINSON: No, Your Honor.

19 THE COURT: Mr. Birmingham?

20 MR. BIRMINGHAM: No, Your Honor, but I would like to  
21 move for the admission of San Luis Exhibit B for  
22 identification.

23 THE COURT: Any objection?

24 San Luis Exhibit B is received in evidence. Is A in  
25 evidence? I guess it is.

1 THE CLERK: It is, subject to completeness.

2 (Defendants' Exhibit SL B was received.)

3 THE COURT: Somebody had said something about San  
4 Luis A, whether there was more to add to it.

5 MR. BIRMINGHAM: Excuse me, Your Honor, I'm not  
6 familiar with San Luis A, I wonder if this is an issue that  
7 you would take up with Mr. O'Hanlon when he returns.

8 THE COURT: Yes, we certainly can.

9 MR. BIRMINGHAM: Thank you.

10 THE COURT: Now, as I understand it now, let me ask.  
11 May Ms. Goude be excused?

12 MR. WALL: Yes, Your Honor.

13 MR. MAYSONETT: Yes, Your Honor.

14 MR. LEE: Yes, Your Honor.

15 MR. WILKINSON: Yes.

16 MR. BIRMINGHAM: Yes, Your Honor.

17 THE COURT: Thank you, Ms. Goude. You may step down.  
18 You are excused.

19 That concludes our testimony for today. Everybody is  
20 certain as to when we are resuming.

21 MR. ORR: What's the time? Is it nine a.m. on --

22 THE COURT: I believe we had agreed it was one p.m.  
23 Let's -- let me ask the courtroom deputy. Because it has  
24 changed so many times, I don't know when we're starting.

25 THE CLERK: On Tuesday, I believe it will have to

1 be -- we have Rosales in the morning.

2 THE COURT: We have an extended criminal sentencing  
3 starting at nine. It could be an hour, it could be more.

4 MR. MAYSONETT: Your Honor, to clarify, was that  
5 Tuesday or Wednesday?

6 THE COURT: That's Tuesday.

7 MR. ORR: That's the day that Mr. Wall is  
8 unavailable, I believe.

9 MR. WALL: I thought we had agreed to resume on  
10 Wednesday, Your Honor.

11 THE COURT: All right. That's what I'm asking. Do  
12 we have --

13 MR. WILKINSON: That was our understanding.

14 THE COURT: At this point, I was totally uncertain.

15 MR. WILKINSON: Your Honor, it was our understanding  
16 that it would be Wednesday.

17 THE COURT: Nine. All right. We will now stand in  
18 recess until Wednesday, August 29th, 2007 at nine a.m. and we  
19 will have then through Friday to complete this proceeding.

20 MR. WALL: Thank you, Your Honor.

21 MR. MAYSONETT: Thank you, Your Honor.

22 MR. ORR: Thank you.

23 MR. WILKINSON: Thank you.

24 MR. LEE: Thank you.

25 MR. WILKINSON: Your Honor, before we adjourn, so to

1 speak, I don't know if we have actually resolved the issue of  
2 the declarations that some of the parties would like to have  
3 the Court consider. We have gone through our list and have a  
4 short list of people whose declarations we would like to  
5 introduce. And I'm wondering is that something we should take  
6 up on Wednesday, Thursday, Friday? When would you like --

7 THE COURT: Yes, I would like you to. We can take it  
8 up first thing on Wednesday. I'd like you to focus it. And  
9 quite frankly, reduce it to what you think is the essential  
10 minimum because I don't want to have anything extra to read  
11 that I don't need to.

12 MR. WILKINSON: We understand that and we've  
13 attempted to do that.

14 THE COURT: All right. So that we will do first  
15 thing on Wednesday. I have another proceeding starting now,  
16 so if you're standing waiting for me, I'm not leaving. We are  
17 in recess.

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